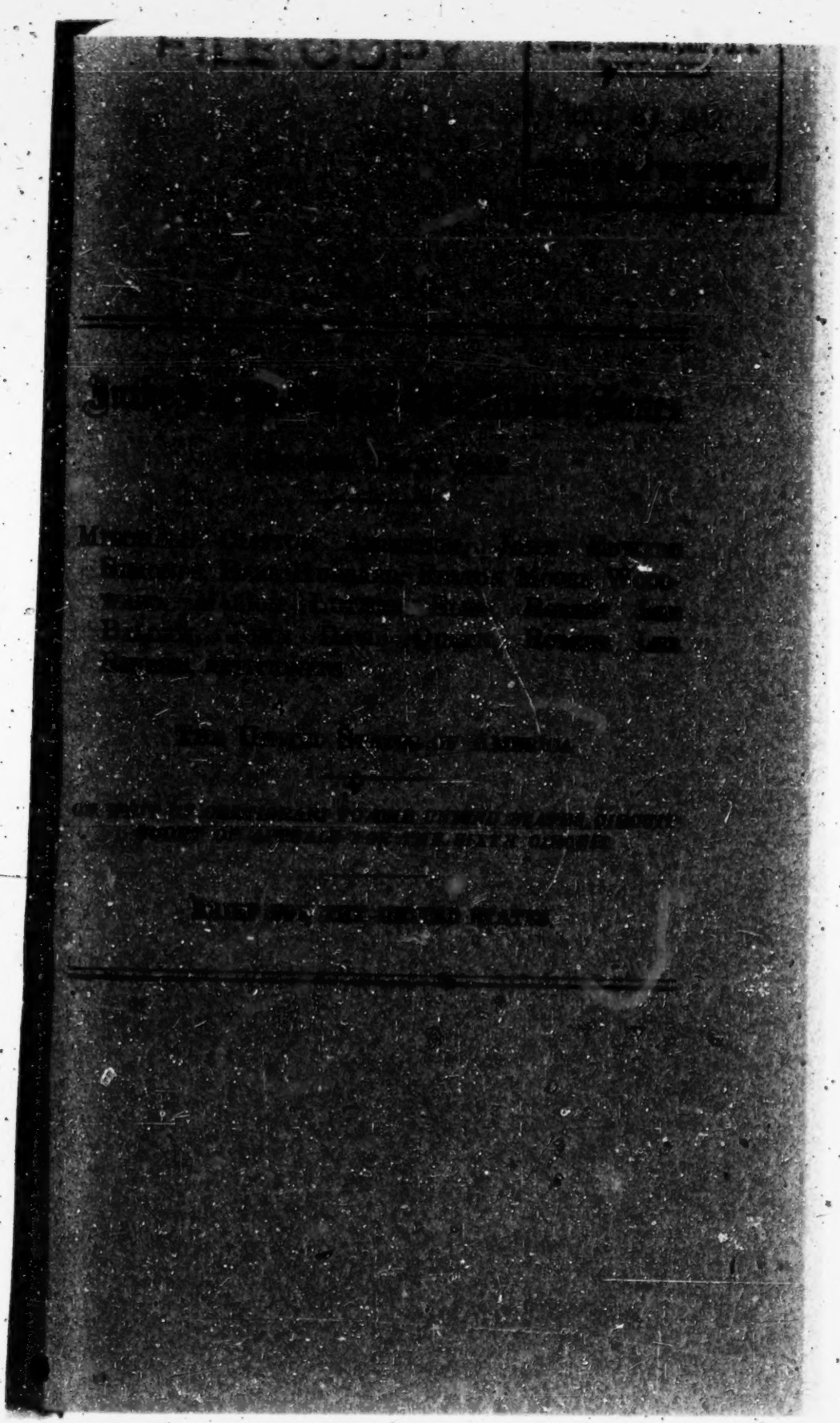

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 10

MITCHELL CLIFTON ANDERSON, JOHN EDWARD SIMONDS, EARL HUBBARD, FELTON MOORE WOODWARD, MARION LUTHER ELLIS, ROBERT LEE BALLEW, JOHN DAVID QUEEN, ROBERT LEE RHODES, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 868–884) is reported in 124 F. (2d) 58.

JURISDICTION

The judgment of the circuit court of appeals was entered December 4, 1941 (R. 867). The petition for a writ of certiorari was filed January 9, 1942, and granted April 6, 1942. The jurisdic-

tion of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the confessions of petitioners Simonds, Woodward, Hubbard, Queen, Ballew, and Rhodes were admissible in evidence against them.

2. Whether, if a confession was erroneously admitted in evidence, the error is ground for reversal as to others than the person who confessed.

3. Whether the Government was required to prove the participation of petitioners Queen, Ballew, and Rhodes in the conspiracy by evidence independent of their confessions.

STATEMENT

Petitioners were convicted [1] (R. 862–863) in the District Court of the United States for the Eastern District of Tennessee upon an indictment (R. 2–22) charging a conspiracy to damage property of the Tennessee Valley Authority, a corporation in which the United States is a stockholder, in violation of Sections 35 (C) and 37 of the Criminal Code, as amended, 18 U. S. C. 82, 88. Peti-

[1] At the end of the Government's evidence, the court directed verdicts of not guilty as to seven of the defendants: Van D. Jones, James Gordon Parr (R. 579), Tate C. Green, Leslie Bryant Green (R. 580), Clyde L. Huffman, William Clint Huffman, and Benjamin Cross (R. 581). Five of the defendants, John E. McGhee, Joel Martin Simonds, Thomas Wayne Henry, Meggs Collins, and William Rans Smith, were acquitted by the jury (R. 862–863).

tioner Anderson was sentenced to imprisonment for two years and to pay a fine of $5,000 (R. 31–32); petitioner Ellis to imprisonment for fifteen months and costs (R. 38); and petitioners Simonds (R. 32–33), Woodward (R. 33–34), Hubbard (R. 34–35), Queen (R. 35–36), Rhodes (R. 36–37), and Ballew (R. 39–40) to imprisonment for two years and to pay fines of $1,000. The judgments of conviction were affirmed by the circuit court of appeals (R. 867).

A. THE EVIDENCE EXCLUSIVE OF THE CONFESSIONS

On July 14, 1939, the International Union of Mine, Mill and Smelter Workers, affiliated with the Congress of Industrial Organizations (R. 698, 740), called a strike at the Tennessee Copper Company mines at Copperhill, Tennessee (R. 137, 689). Petitioner Anderson was the national representative and organizer for the Union (R. 614), and the other petitioners were members who were out on strike (R. 606, 652, 670, 681, 698, 734, 745). The plant was closed, but reopened six weeks later while the strike was still in progress (R. 550). Meanwhile, the sheriff of Polk County had appointed a number of special deputies (R. 551, 553) and established headquarters at the company-owned Y. M. C. A. building at Copperhill (R. 247, 551–552, 733). At the time of the crime, 18 or 20 deputies were quartered there (R. 171–172, 307; cf. R. 552–553, 635).

The strike continued through April 1940. At that time two transmission lines belonging to the Tennessee Valley Authority led into that part of Polk County, Tennessee, and Fannin County, Georgia, known as the Copper Basin. The lines were supported on wooden poles and steel towers. One line and its feeders was known as the Parksville, or Ocoee line; the other as the Blue Ridge line. From these lines the Company obtained power for its operations (R. 125–129).

Shortly after midnight on April 1, 1940, both lines were dynamited, interrupting the service (R. 125, 127).

On April 13, 1940, one Freed Long, who was the principal witness for the Government, attended a meeting at petitioner Anderson's office in Ducktown.[2] Long had a withdrawal card of the union but had helped on the picket line (R. 132, 137, 594–595). He was driven to the meeting in Anderson's car by petitioner Ellis (R. 132, 137). There Long met Anderson, John McGhee, Clint and Clyde Huffman, Rans Smith, and Felton Woodward (R. 132–133, 138). Woodward, who is a petitioner here, and the Huffmans, who are not, left as Long arrived, after talking with Anderson in a tone inaudible to Long; but the others remained (R. 133, 138). Anderson then told Long that "They were going to try to shut the plant down and wanted to kind of jamb up the mine

[2] Long testified that this was not the regular union office (R. 137).

a little bit and wanted me to help them do that; the plans were to go down in the mine and blow up the magazine, they were going to shut the power off too, somebody was" (R. 133, 138–139). Long's part was to go down with them into the mine (R. 133–134). "Nothing was said about blowing the towers there that night or that afternoon, they just said the power would be off" (R. 133). At 8:54 p. m. the next night, April 14, 1940, a steel tower on the Parksville, or Ocoee, line was dynamited, interrupting service on that line (R. 125, 127–128). About thirty minutes later a steel tower on the Blue Ridge line was dynamited, but the power line did not go down and service on it was not interrupted (R. 128). The record does not show whether any effort was made to blow up the mine.

Long also testified that on April 18, 1940, he attended another meeting in Isabella, Tennessee. Petitioners Anderson, Woodward, Hubbard, and Simonds were among those present (R. 134, 139–140). "They talked about blowing up the mines and shutting off the power again" (R. 134). Anderson wanted the towers and poles blown up (R. 134). Simonds was to "look after" the Blue Ridge line, and Woodward, the Parksville, or Ocoee, line (R. 134, 142). As to the mine, since Long was not experienced in mining, it was decided that he would stand guard outside the mine "to keep them from being surprised going in or out" (R. 135).

After this meeting Long informed B. E. Biggs, the sheriff of Polk County, that the Parksville and Blue Ridge lines, as well as the copper mine at Isabella, would all be blown up at 1:20 a. m. on April 24th (R. 557, 563, 564). The sheriff testified that he had stationed men at the mine (R. 563–564), but that he had been unable to patrol the power lines, each of which extended about 10 miles through rough country (R. 467, 563). On April 24th, between 1 a. m. and 2 a. m., towers on both the Blue Ridge line and the Parksville line were dynamited; on both lines service was interrupted (R. 125, 128).

In addition to Long's testimony the chief evidence for the Government was the confessions presently discussed, but there was other corroborating circumstantial evidence. Phelps, an employee of the Hercules Powder Company in Bessemer, Alabama, testified that a "John M. Cash" had bought dynamite and fuse from him on April 9, 1940 (R. 510–511). Casings and burned fuse found in the vicinity of power line towers showed that the same kind of dynamite had been used to destroy them (R. 148–151, 155, 162–164, 426–427, 478–479, 510–511). Phelps identified Woodward as "John M. Cash" (R. 511–512). On Monday morning following the dynamiting on

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One Parsons, who assisted Phelps, corroborated Phelps' account of the sale and identified Felton Woodward's brother, Sweat Woodward as "John M. Cash" (R. 515–516).

Sunday night, March 31st, paper covering for dynamite was found at the Rogers Ferry Bridge (R. 448, 151–152, 156, 162) where, according to Woodward's confession (R. 450), he had stopped his car and had given one of the others one-half of the dynamite he had and 250 feet of fuse to blow up the Parksville line. Simonds told Agent Roche how one of the men with him had dropped into the river the auger used to bore holes for the dynamite in the wooden poles blown up on March 31st (R. 417); and, following Simonds' directions, F. B. I. agents, Roche and Mann, and two deputy sheriffs retrieved an auger from the river at the spot indicated by Simonds (R. 417, 442, 466). Simonds also asked the agents whether bloodhounds had been used in an effort to track those who dynamited the towers on April 14, 1940 (R. 417). Bloodhounds had been used but would not follow the tracks, which were plainly visible (R. 418; 571). When Simonds was so informed, he explained that he had wrapped his feet in gasoline soaked rags that night, knowing that no dog could then follow his track (R. 418). There was also evidence that Ellis, who was closely associated with Anderson (R. 587, 611), had been driving Anderson's car on back roads on the night of March 31st, when the first dynamiting occurred (R. 152–153). He was stopped about fifteen minutes before the first explosion and in the car were a brace and two bits; the larger bit measured about an inch and a quarter (R. 152–153, 154,

157). Later it was found that the wooden poles dynamited that night had been bored with a brace and bit to make holes for the dynamite (R. 153).

Petitioners attempted to impeach Long by testimony that he asked for a bribe to testify favorably to them (R. 143–145, 585, 590, 629–630, 646–647). They offered numerous character witnesses. Woodward had witnesses to show that he was in Atlanta, Georgia, when "John M. Cash" bought the dynamite in Bessemer (R. 648–651). Ellis explained that he was driving around on the night of March 31st to "relieve the baby's colic" (R. 606–607). A Mrs. Carter testified that Ballew was farming on certain days on which, according to his confession, he was arranging the explosion (R. 766–767). With these exceptions, the petitioners offered no alibis.

B. THE CONFESSIONS AND THE CIRCUMSTANCES UNDER WHICH THEY WERE MADE

The following evidence as to the confessions is undisputed:

On April 24, following the last explosion, Sheriff Riggs began to take into custody the men he suspected of the dynamitings because Long had named them in connection with meetings at which the dynamitings were alleged to have been planned (R. 192, 428). The sheriff made the arrests on state charges (R. 172–173, 175, 304, 540, 542) on his own initiative and not at the request of the Agents of the Federal Bureau of In-

vestigation" (R. 170, 175–176, 303–304, 332, 353–354, 441, 467, 542). It is not clear how many men were arrested; the highest number shown in the record is that the sheriff arrested all twenty-one defendants (R. 540). Although the dates of all the arrests were not exactly specified, it appears that Simonds, Woodward and Hubbard were arrested on April 24th (R. 200, 223, 247); Queen and Rhodes, on April 28th (R. 682, 733–734); and Ballew, on April 30th (R. 746). The sheriff had no warrants, except possibly for one or two men; apparently he believed that none was required by local law (R. 546, 550). No preliminary hearings were conducted until April 30th when the defendants were for the first time taken into custody by federal officials and arraigned before a United States Commissioner on a complaint filed the previous day (R. 170, 217, 261, 549–550).[4]

While the defendants were held in the custody of the sheriff on state charges, they were questioned at the Y. M. C. A. in Copperhill by Agents from the Federal Bureau of Investigation (R. 170–171, 307).[5] Simonds, Woodward, Hubbard,

[4] After the complaint had been filed in the District Court of the United States the sheriff arrested five or six men at the request of Special Agent Roche (R. 170). But that occurred after the confessions were made and has no relation to them.

[5] Ballew was arraigned on the "2nd or 3rd," having signed his confession May 1 (R. 756).

[6] The agents who made the investigation and whose testimony upon the confessions is material were Plaxico, Roche,

Queen, Rhodes, and Ballew made confessions setting forth in detail how the dynamitings were planned and executed.[5] At the trial appropriate objections were made to the use of the confessions as evidence on the ground that they were involuntary (R. 167, 775–776). The court conducted a preliminary examination in the absence of the jury (R. 168–403) and much the same testimony was repeated in the presence of the jury.[6] The testimony was sharply conflicting as to the nature and extent of the questioning and the treatment that the petitioners received while they were in custody.[7] In our memorandum in response to the petition for certiorari (pp. 11–25), we summarized the conflicting testimony so that a synopsis of the record might be available. Since the triers of fact found the confessions to be voluntary and refused to credit the petitioner's evidence, we set forth hereon the disputed points only the evidence for the Government.[8]

Maine, Hevron, Morgan, Whitten, Lunsford, and McCabe (R. 109, 288, 330).

[5] Simonds (R. 412–415); Woodward (R. 445–462); Hubbard (R. 501–505); Queen (R. 518–521); Rhodes (R. 524–526); Ballew (R. 527–529).

[6] By stipulation the evidence as to the admissibility and credibility of the confessions of Queen, Rhodes, and Ballew was heard but once and in the presence of the jury (R. 516–517).

[7] In setting forth a detailed statement of the evidence concerning the circumstances under which the petitioners confessed, we shall rely primarily upon the preliminary exam-

Simonds.—Simonds was arrested between three and four o'clock on the afternoon of Wednesday, April 24th (R. 223–224, 234; R. 652). He was not questioned that afternoon or evening.

On Thursday, April 25th, about 2 o'clock, Simonds was questioned for the first time; Plaxico, Roche, and Mann, F. B. I. agents, interrogated him for a total period of about two hours (R. 172, 173–174; 274, 289, 309, 315, 326, 336; R. 490, 786–787).[9] Plaxico and Roche also questioned him that evening for two hours beginning at seven o'clock (R. 174, 175, 274, 283; R. 411, 787).[10]

On Friday morning, Plaxico questioned Simonds for about an hour; perhaps Roche and Mann were present (R. 311–312).[11]

On Saturday, Agent Morgan questioned him for half an hour or less (R. 387, 397) as did Plaxico (R. 315, 490).

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nation and shall set forth following a semicolon in the record reference any corresponding page in the record of the testimony heard by the jury. Inconsistencies between the two will be noted in the margin.

[9] Apparently Roche was there for the full two hours (R. 172–174); Plaxico for part of the time, forty-five minutes together with Roche and Mann (R. 289, 315); and Mann for one hour, together with Roche (R. 326, 336).

[10] Roche was the only agent to mention this period of questioning. Even from his testimony alone, it is not clear whether Mann was present. Compare R. 283 with R. 429.

[11] Plaxico testified that he "thought" that Roche and Mann were with him (R. 314–315). But Roche and Mann each testified that he did not question Simonds between Thursday and Sunday (R. 176, 325).

On Sunday, Plaxico and Roche questioned Simonds (R. 176, 274–275, 289, 411, 787). "We went over the entire case with him, and pointed out the discrepancies in his story and the information we had developed on investigations which knocked down his alibi, and out of a clear sky he said 'well, I want to tell you I am guilty'" (R. 291). This took about an hour (R. 274–275). Mann came in while Simonds was making his oral confession (R. 326). Petitioner Hubbard had been present all this time and petitioner Woodward came in shortly after; both were present when Roche took Simonds' written statement, and all of them described "their entire activities" (R. 168, 176, 178, 297; R. 411–412).

Plaxico, Roche, and Mann each denied Simonds' testimony that he had asked them for counsel (R. 175, 290–291, 327, 372; R. 432–433, 473, 787–788, 791, 820).[1] Each testified that no threats or promises had been made to obtain the statement (R. 274, 291, 327, 337; R. 411, 787, 791) and each specifically denied that he or anyone in his presence had threatened a severe sentence or promised a light sentence (R. 177, 290, 291, 327, 337; R. 787), a low bond (R. 177, 277, 317, 327, 337; R. 791), or probation or parole (R. 274,

[1] Morgan, the other agent who questioned Simonds, denied that such a request was made of him, thus negativing the possibility that Simonds was mistaken as to the identity of the agent to whom he made his request (R. 388).

277, 287, 296, 317, 337; R. 791).[14] Each also denied cursing Simonds (R. 186, 276, 289, 290; R. 472, 787, 791, 820) and testified that, contrary to Simonds' assertion, Mann had never shown a gun or threatened to strike him (R. 277, 372) and that Mann was not even armed (R. 277). Morgan was the only other agent to question Simonds,[15] and Simonds admitted that Morgan said nothing "out of the way" to him (R. 660).

Since they had not held Simonds in their custody, the F. B. I. agents were unable to testify in detail concerning the food given Simonds to eat. Agents Roche and Hevron both testified, however, that they understood that the same regular meals were served to the men in custody as were given to the deputy sheriffs (R. 174, 188–189, 355; R. 429–430, 433, 435–436, 440–441).[16]

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[14] A deputy sheriff, Campbell, testified that he had told some of the men in jail that Plaxico would recommend a parole for "those boys that come clean," but he could not remember when the statement was made (R. 272–273) and Simonds did not claim to have heard it. Plaxico denied that he had made such a statement to Campbell but testified that Campbell had asked him to recommend leniency and that he had replied that all he could do would be to tell the facts (R. 318). This talk between Plaxico and Campbell took place after the confessions had been signed (R. 318–319).

[15] A day or two after he had confessed, Simonds was present when Whitten took a statement from Ballew. Whitten testified that he did not offer Simonds inducements or threats (R. 372, 388).

[16] This understanding was confirmed at least in part by Joel Simonds (not the petitioner) who was also in custody and who said that he ate with the deputies (R. 637).

Several of petitioners, including Simonds, complimented the agents on the way they had been treated and said that the food was good (R. 188–189, 196, 292; R. 435, 476; R. 787). Before the jury, but not on the preliminary examination, the sheriff and two deputies testified that the men in custody ate the same food as the deputies, that the food was carried to the jail when necessary,[17] that the men in custody usually slept at the Y. M. C. A. "in the same kind of beds" that were furnished the deputies, and that no one was forced to spend more than two nights in jail (R. 554, 567–569; see also R. 670). Simonds had no visitors, but Mrs. Simonds knew that he was being questioned (R. 178–179, 287); and the Union apparently was prepared to give legal aid.[18]

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[17] Hensley, the cook at the Y. M. C. A., testified (R. 570) that "The deputy sheriffs ate the same meals as the prisoners. They had the same thing as the guards ate. We should run a regular course of meals through the week and chicken on Sunday, roast beef, stew, steak and onions or something like that. We had coffee about 19 cents a pound. I made it in an urn and drank it myself and these men drank the same sort of coffee I did. I never put anything in the coffee. I have carried food down to the city jail from the YMCA myself."

[18] Counsel had been retained by the Union "two or three weeks before this matter arose" (R. 768). One attorney testified that he "made considerable effort to contact the men in custody who I considered to be my clients, before I was permitted to see them" (R. 768) but apparently he was speaking of a time after the complaint had been filed (R. 768–769). The record does not show that counsel made any effort to obtain their release from custody prior to the day upon

Hubbard.—Hubbard was arrested on Wednesday evening, April 24th, and was taken first to the Y. M. C. A. and then to the county jail in Copperhill (R. 200–201; R. 666–667).

Plaxico, Roche, Mann, and Hevron questioned Hubbard on Thursday afternoon for about two hours (R. 181, 296–297, 309, 322–323, 335, 345, 351, 434, 490, 500; R. 788). Plaxico and Roche questioned him for two hours that evening (R. 282–283; R. 788).

On Friday, in the evening, Whitten and Lunsford interrogated him from seven-thirty to nine-thirty (R. 358–359, 362–363, 367, 375, 376; R. 505, 506–507). During the day, Morgan, and perhaps McCabe, asked questions for fifteen or twenty minutes or longer (R. 384, 391),[19] and Roche questioned him for about 45 minutes (R. 434).

On Saturday, McCabe questioned Hubbard for two hours (R. 497). Morgan asked occasional questions in the afternoon (R. 384, 392). Plaxico, accompanied by Roche on one occasion, interrogated him twice, each time for about half an hour (R. 182, 313, 314–315; R. 434, 490–491).

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which they were arraigned (R. 768–770). Campbell, Chief Deputy Sheriff of Polk County (R. 268), testified that on one occasion Mr. Hunt and Mr. Townsend (petitioners' counsel) came to Copperhill to see petitioners and Campbell told them that "he would rather the Sheriff would be there before he talked to him [them?]" (R. 271). The record does not show whether counsel waited or made any attempt to see Sheriff Biggs.

[19] McCabe did not mention this interview.

On Sunday, Hubbard was present while Plaxico and Roche talked to Simonds; Hubbard admitted his guilt immediately after Simonds (R. 194–195, 275, 293, 297, cf. 323–324; R. 435, 788). Later that evening after Woodward also had confessed, the three were placed in jail together at their own request "to get the details of their stories straight" (R. 188, 276, 326–327). Hubbard's confession was written out as he repeated it to Whitten and Lunsford on April 30th in about two hours (R. 364–365, 368, 379; R. 506).

Each of the agents who questioned Hubbard denied Hubbard's testimony that he was mistreated. In response to his assertions, they stated that during the periods of questioning Hubbard wore his glasses (R. 183, 299, 324, 346, 359, 368, 387; R. 435, 491, 497, 506, 789, 791); was allowed to smoke and smoked almost continuously (R. 299, 324, 325, 345–346, 359–360, 369, 385; R. 435, 497, 506, 788, 791–792, 808), was not cursed (R. 186, 281, 299, 324, 325, 346, 360, 372, 386; R. 492, 788–789, 800) or pushed back in his chair (R. 325, 346, 360, 369, 386). No threats or promises, and no offer of a light sentence or parole, were made to him (R. 281, 324, 347, 359, 361, 371, 377, 386; R. 506); he was not refused water (R. 325, 360, 368, 385) or offered a good meal if he would make a statement (R. 369; R. 809; cf. R. 385, 394).

Hubbard had a cold (R. 183) and when he complained of a headache on Saturday the agents wanted to call a doctor but Hubbard said that he

would be all right and they gave him an aspirin (R. 393, cf. R. 370–371). The doctor, who was summoned later, found that Hubbard had an ordinary cold and no fever; he gave him some capsules "what we usually give for common colds" and a laxative (R. 199; cf. 183; R. 565).

The general testimony showing that the defendants had been properly fed by the Sheriff and were given fit sleeping quarters was applicable to Hubbard as well as to Simonds. See pp. 13–14, *supra*. Like Simonds, Hubbard thanked Plaxico for the way he had been fed and treated (R. 300, 369–370, 441, 491; see also R. 325). On one occasion Hubbard asked for an attorney but instantly changed his mind, saying that he did not need one because he had done no wrong (R. 346–347, 352; cf. R. 325, 359, 368, 385; R. 473).

Woodward.—On Wednesday, April 24th, Woodward was taken into custody and lodged in the city jail for the night (R. 247–248; R. 690). He was not questioned that day (R. 247–248; R. 690).

On Thursday, April 25th, Roche, Mann, and probably Hevron, questioned Woodward for two hours (R. 187, 278, 279, 282, 328, 336, 348, 353).[20]

[20] Hevron testified that he and Mann did the questioning (R. 348, 353). Roche said that he and Mann were present (R. 279, 282). Mann said on the preliminary examination that he was present but was not asked who was with him (R. 328), and before the jury said that Plaxico was with him (R. 467). Woodward testified that it was Mann and one other (R. 249, 252) but he identified Hevron as Mann (R. 255).

Before the jury it also appeared that Roche questioned Woodward again between seven and nine o'clock that evening (R. 436).

On Friday and Saturday, Woodward was not questioned, unless Saturday was one of the two unspecified occasions on which Morgan asked Woodward questions for about fifteen minutes (R. 388–389).[2]

On Sunday Woodward was brought into the room at the request of Simonds and Hubbard after they had confessed and, upon being told of their confessions, admitted his guilt (R. 187, 195, 274–276, 293–294, 297, 323). At that time Mann, Plaxico, and Roche were present, as were petitioners Hubbard and Simonds who took the initiative in questioning Woodward (R. 293).

On Monday, Woodward's statement was taken by Mann, McCabe, and Hovron (R. 187, 294, 348, 354). It consisted of five typewritten pages, single spaced, and much of the time was spent in typing it, because Agent Mann was not a rapid typist (R. 329, 343; R. 445–462, 470, 497–498) and because Woodward had trouble recalling details concerning the times of the dynamitings and meetings which he attended (R. 343; R. 470). This took from about 11 a. m. until 2 p. m., and after recess for lunch, from about 3:30 p. m. until 7 or 7:30 p. m. (R. 341, 354; R. 470, 497–498, 499–500).

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[2] Before the jury Morgan did specify Saturday as the day on which he questioned Woodward (R. 818).

The agents specifically denied Woodward's testimony that promises had been made to him and that he had been threatened. Thus, Plaxico testified that he did not promise Woodward that he would "be taken care of" (R. 296, 330, 390), that a low bond would be arranged (R. 317, 337; R. 469),[22] or that he would be "paroled" (R. 280, 295, 296, 317–318, 330; R. 469). Similarly, Plaxico denied that he had offered to have a state charge for a felonious assault dismissed (R. 280, 296; R. 789, 792). The agent who had questioned Woodward said that no one told Woodward that the agents were in Copperhill to break the strike and "get" Anderson (R. 280, 295, 330, 349, 389–390; R. 433); no one threatened Woodward or cursed him as a liar (R. 279–280, 281, 295, 349, 357, 389, 390; R. 500, 800, 818, 820–821). On the contrary, he was told that he need make

[22] The United States Commissioner, before whom petitioners were arraigned on May 1, 1940, on federal charges, testified that Agent Mann requested that he fix the bond on the defendants who pleaded guilty at $1,000 and on the others at $2,000 (R. 217–218; R. 573–574). The attorney for the defendants put himself on the stand before the jury and corroborated this (R. 644). The Commissioner also had a note that "May 3, 1940, * * * at the request of Mr. Mann, Agent, the bond of Felton Woodward was reduced from $3,000 to $1,000" (R. 218). Mann denied positively that he had made any such recommendations (R. 337–338; R. 469–470). Roche testified, and the office records were introduced to support him, that Mann had been in the Knoxville office all day on May 3, 1940 (R. 437, 475–476). The Commissioner was then recalled to testify that Mann had made the request before May 3d and that the bond was reduced on May 3d (R. 574).

no statement (R. 193; R. 445), and when his written confession had been typed Mann read it over to him slowly and Woodward said it was the truth (R. 357).

The general evidence showing that the men in custody were supplied with proper food and lodging has been set forth above in our summary of evidence concerning Simonds; it is equally applicable to Woodward. And as is also true of the other petitioners, there was no showing that Woodward sought and was refused permission to see friends, relatives, or counsel.[23]

Rhodes.—Rhodes was arrested Sunday night around 8 o'clock and spent the night in jail in the cell with Woodward, Simonds, Queen, and Hubbard (R. 733–734). At 10 o'clock on Monday he was questioned for an hour and a half or two hours by Agents Whitten and Lunsford, each of whom denied that he had called Rhodes a liar (R.

[23] Sid Howell, petitioner Woodward's father-in-law, testified before the jury, but not on *voir dire*, that on Thursday, April 25, he went to the Y. M. C. A. to see Woodward, and deputy sheriff Rose said "there wasn't anyone allowed to see him at all"; that he went again on Friday, April 26, and another deputy, Creed Brock, told him "that no one was allowed to see him at all, that they was questioning him" (R. 642); and that on Saturday, inside the City Hall in Copperhill, he was permitted to talk to the Woodward brothers through a peephole (R. 643). Sheriff Biggs, however, testified, "I didn't refuse to let Sid Howell see Felton Woodward, but he possibly was not allowed to see him while he was being talked to by me or some of my officers" (R. 555).

801, 809), that either had promised to "take care of him" (R. 801, 809) or that either had promised or threatened anything to obtain his statement (R. 524, 810).[24]

Queen.—Queen testified that on Sunday afternoon, April 28, when he was arrested, his baby was seriously ill; that he and four of the others were put in one cell that night without supper (R. 681–683), and that on Monday, about eight in the evening, he signed a paper, not knowing what was in it, "because the F. B. I. men, Mr. Mann and Mr. McCabe was there and after they got through talking with me they got up and turned their backs and McCabe wheeled around and said sign this right here, I guess you are in a hurry to get back to your wife and baby" (R. 683, 684).

The agents denied Queen's assertions (R. 794–795, 820–821). McCabe took the statement in longhand; Hevron and Mann were present (R. 517–518, 521–523). They testified that no promise or threats of any sort were made to obtain Queen's confession (R. 518, 522, 523; R. 800, 821) and that on the contrary Queen said "he was anxious to give a statement, that he thought he had been misled" (R. 523).

[24] Rhodes also said that he "couldn't see a lawyer or anybody" but apparently was speaking of the day on which he pleaded guilty (R. 737). The agents were not asked specifically whether Rhodes asked for an attorney before the confession was signed.

Ballew.—Agents Lunsford and Whitten both testified that when they first talked to Ballew he had not been arrested (R. 530, 535–536, 801–802, 811, 814). Deputy Sheriff Clyde Dale had taken them to see Ballew at Edna Carter's house (R. 530, 535, 801, 802, 810), and they all went to Copperhill to talk because the Carter house was full of people (R. 806, 814–815). "When he came out [of the house], at our request, on his own free will and acquiescence, he agreed to accompany us to Copperhill where we could talk to him and take our time. He said he would be glad to cooperate in any way since he knew nothing at all about the matter at that time" (R. 810–811; cf. R. 530, 532, 536, 538, 801–802, 807). No handcuffs were used (R. 802, 811). At the Y. M. C. A. they talked for about an hour (R. 531, 537). When they were finished Ballew himself asked to stay at the Y. M. C. A. to talk to the sheriff although the agents offered to drive him home (R. 817; see also 533, 538, 539, 806, 817). That night the sheriff took him into custody and the next morning he was taken to the courthouse where he signed a confession (R. 803). At the courthouse the next day, the agents "had not talked [to him] over four or five minutes" when he said "get your paper and typewriter, or words to that effect" (R. 812). Simonds was also there and the two "talked about their part in the dynamiting, and after they discussed the case between themselves" Ballew "just told us [Lunsford and Whit-

ten] about it, and voluntarily signed" his statement (R. 803), after reading it and having it read to him (R. 803, 812–813). The agents denied that they had hidden the paper or told Ballew that he was signing a release (R. 803, 813). Ballew admitted "nobody cussed me out and I was not abused or threatened" (R. 758; cf. R. 747).

After the close of the preliminary examination, the court ruled that the confessions were admissible in evidence (R. 403, 775–776). The court stated that there was "no showing so far as duress is concerned, that they were forced to make any statement that was an involuntary statement" and that the statements were not made "as the result of any promise of reward" (R. 403).

The court also submitted to the jury the question whether the statements were voluntary and charged that the confessions should not be considered unless the jury first found that they were freely and voluntarily made (R. 831). He discussed the rule and relevant considerations in great detail (R. 831–834). The jury apparently believed the agents and not the petitioners' testimony, for they found the petitioners guilty.

SUMMARY OF ARGUMENT

I

A. A "voluntary" confession is admissible in evidence but a confession will be excluded that was coerced. This familiar criterion serves two purposes. The first is to admit only evidence

whose testimonial worth is guaranteed by the normal will of an innocent man not to incriminate himself falsely. A confession is not involuntary in this sense, therefore, unless it was made under such circumstances that the defendant's will was overcome by promises, threats, or mistreatment, thus rendering his involuntary statement too unreliable for evidence. The second purpose is to give effect to the aim of the Fifth Amendment to protect the right of the individual to personal security, personal liberty, and the privacies of life, at least until convicted of crime. A confession is not involuntary in this second sense, therefore, unless the state exerted physical or moral compulsion to extort the confession, or pressed the defendant with accusatory questions which were themselves coercive because fear or physical debility had bereft the defendant of power to assert his will. If an extra-judicial confession is "voluntary" within these two tests, then it is admissible regardless of whether it was made in the course of an examination by the police, or during the subsistence of lawless acts such as wrongful delays in arraignment. Police misconduct is relevant in determining the ultimate fact that a confession was voluntary or involuntary, but it is not *per se* a ground for exclusion.

B. The issue of whether a confession is voluntary is a question of fact. The trial court has far greater opportunities to decide it accurately than an appellate court. The trial court is closer to

the events and sees the actors; therefore it can recapture more easily than an appellate court the nuances of the events and the atmosphere in which they occurred. Moreover, the ultimate conclusion often must depend upon the personality of the defendant and his reaction to the circumstances, and only the trial court has the opportunity to observe the defendant. It will not do in all cases, therefore, to limit the function of the trial court to that of resolving direct conflicts in the testimony. The trial court should be allowed considerable discretion in finding the ultimate fact of whether a confession was voluntary, and its conclusion should be set aside only when it is clearly against the weight of the evidence.

C. Applying these principles to the instant case, we think it is clear not only that the trial court did not abuse its discretion but that its ultimate conclusion was inescapable.

There was ample testimony to show that petitioners made their confessions deliberately and that they were offered no promises or threats. The evidence for the Government was emphatic that the Special Agents from the Federal Bureau of Investigation did not abuse the petitioners or offer them any indignity; and although there was less certainty in the evidence concerning how the sheriff housed and fed the petitioners, it is clear that their claims of mistreatment were exaggerated and that they suffered no serious discomfort on this score.

The confessions were not spontaneous but the Special Agents' description of the events establishes that they were nonetheless voluntary. The questioning consisted only of hearing the petitioners' stories, of pointing out to the petitioners a few days later that investigation had disproved their explanations, and of taking the statements made by the petitioners, without urging or even questioning, as soon as they realized that the agents could not be deceived.

The atmosphere in which the questioning occurred should not alter the conclusion. Three of the petitioners were unlawfully detained for four days before they confessed. The conduct of the sheriff in holding them so long without arraignment is not to be condoned but neither it nor the fact that petitioners saw neither friends nor counsel seems likely to have seriously affected their wills. A number of them were in custody together; they must have realized that their friends and families knew them to be in custody. It is significant, therefore, that none of the petitioners even suggested that he sought and was denied leave to communicate with them. The petitioners were held during a strike in a company building surrounded by deputy sheriffs who had been guarding company property. But the petitioners were not questioned by the deputies and did not testify that the deputies bullied them or that the deputies' presence put them in fear. There is nothing to show that these intangibles affected the peti-

tioners, and the sequence of events is convincing that the petitioners confessed almost spontaneously, not from fear and oppression, but because having learned that investigation had destroyed their alibis, they wished to ease their minds. We submit, therefore, that there is no substantial probability that the will of any petitioner was bent by the circumstances to the will of the Government agents that he should make a confession, and that the trial court did not err in ruling that the confessions were admissible.

II

Even if the trial court erred in admitting one or more of the confessions, the error would not be ground for reversing the conviction of any but the petitioner whose confession was erroneously admitted. The charge made it clear that the confession of one defendant was not evidence against the others and it is not to be presumed that the jury failed to follow the court's instructions. Consequently no petitioner can predicate a claim of error upon the improper admission of a confession which was not received in evidence against him.

Furthermore, none of the petitioners was prejudiced by the admission in evidence of another's confession implicating him. Anderson and Ellis, who did not confess, have abandoned their attack upon the sufficiency of the evidence, and the proof of their guilt was so overwhelming that the cumu-

lative effect of mentioning their names in cross-examination from the confessions can have been of little consequence. And the confession of each of the other petitioners, together with the corroborating proof, so completely establishes his guilt that he could not have been prejudiced even though another's confession implicating him might have been erroneously admitted.

III

There was ample proof in addition to the confessions to render adinissible the confessions of Rhodes, Queen and Ballew and to support their convictions. The rule that a confession must be corroborated requires only that there be other evidence of the *corpus delicti*. In a conspiracy case the *corpus delicti* is the agreement, and it was proved by the testimony of Freed Long and the description of the explosions. There is no necessity to prove by evidence outside of the confession that the defendant committed the crime.

ARGUMENT

I

THE CONFESSIONS OF PETITIONERS SIMONDS, HUBBARD, WOODWARD, QUEEN, RHODES, AND BALLEW WERE VOLUNTARILY MADE AND THEREFORE WERE ADMISSIBLE IN EVIDENCE AGAINST THEM

INTRODUCTORY

It is familiar and settled law that a "voluntary" confession should be admitted into evidence, and

that a "coerced" confession should be excluded. Whatever the logic of the criticisms,[26] this test is applicable whether the due process clauses of the Fifth and Fourteenth Amendments,[27] the constitutional privilege against self-incrimination,[28] or the law of evidence[29] be invoked as ground for the objection. The instant case and *McNabb* v. *United States*, No. 25, this Term, present an appropriate occasion for examining the proper application of the familiar test. Neither case presents an instance of the mental and physical torture present in the recent cases dealing with extra-judicial confessions. But both involve statements made after questioning and therefore, although some circumstances are unusual, both touch upon the lawfulness of the Government's constant and deliberate practice of relying upon such statements in the discovery and prosecution of crime.

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[26] The expressions "voluntary" and "coerced" have been criticized on the ground that a confession is always the result of a choice and therefore voluntary. And it is true that in one sense an ignorant negro makes a choice when he confesses in response to the threats of his captors in order to escape mob violence. 3 Wigmore, *Evidence* (2d ed., 1923) § 824. We believe that custom and history have fixed the usage and that the familiar term supplies a meaningful principle when it is understood and applied in the light of its policies and traditions.

[27] *Chambers* v. *Florida*, 309 U. S. 227; *Lisenba* v. *California*, 314 U. S. 219.

[28] *Bram* v. *United States*, 168 U. S. 532, 542–543.

[29] *Hopt* v. *Utah*, 110 U. S. 574; *Sparf and Hansen* v. *United States*, 156 U. S. 51; *Wilson* v. *United States*, 162 U. S. 613; *Wan* v. *United States*, 266 U. S. 1.

As we view these cases, therefore, they involve a branch of the law that requires sensitivity and delicacy, touching as it does at once upon fundamental concepts of justice and upon the broad problems of law enforcement in the interests of protecting the public against crime. In these circumstances, we think it appropriate to examine in some detail the relevant criteria and the underlying rationale in this field in order that we may assist this Court in delineating the general rules to be applied to these cases.

In Point I, A, of this brief, therefore, we shall discuss the meaning of the rule that a confession is to be admitted or excluded accordingly as it is "voluntary" or "coerced." We shall show that the generalization is but a guide to the *ad hoc* decision of each case, a guide which indicates with all the accuracy that is desirable, first, whether the confession is so unworthy of credence as to be excluded in the interests of truth, and second, whether the law enforcement officers have disregarded individual liberties to an extent requiring suppression of any confession made to them.

In Point I, B, we shall show that it is both necessary and desirable for the trial court to be given wide discretion in applying the test of voluntariness. Each case presents a question of fact and of degree which can be most wisely and efficiently judged by the court in which the trial took place, subject, of course, to reversal when its con-

clusion is unreasonable in the light of the evidence.

In Point I, C, we shall show by an analysis of the facts that the six confessions involved in this case were "voluntary" within the rule as we understand it. In our brief in the *McNabb* case we shall discuss, without repeating the general analysis, whether in that case the admissions made by the petitioners there meet the test.

A. A CONFESSION IS ADMISSIBLE IN EVIDENCE IF THE WILL OF THE DEFENDANT WAS NOT SUBJUGATED TO THE DESIRE OF THE LAW-ENFORCEMENT OFFICERS, THAT HE SHOULD MAKE A CONFESSION

The rule which admits "voluntary" confessions and excludes those which are "coerced" is a rule of evidence. In part, it is a common law rule designed to limit the evidence considered to such statements as have testimonial worth. In part it expresses a policy of securing individual liberties by refusing to admit at the trial evidence obtained in disregard of such liberties. We believe, therefore, that the true meaning of "voluntariness" is best understood by examining it from these two points of view.

1. The primary purpose of the rules of criminal evidence is to admit evidence having a sufficient tendency to prove the truth of the charge to warrant its consideration by the jury, and to exclude evidence that is too unreliable. The guarantees of testimonial worthiness normally required are an oath and cross-examination, or a reliable substitute. Any test of the admissibility

of an extra-judicial confession must conform to the general purpose. It must exclude any confession lacking a substitute for oath and cross-examination and, except as some overriding consideration impels a contrary result, it should admit all confessions which have a guarantee of their testimonial worth. Cf. *Lisenba* v. *California*, 314 U. S. 219, 236; 2 Wigmore, *Evidence* (2d ed., 1923), §§ 823, 824.

The only available guarantee of the truth of an extrajudicial confession, apart from internal indicia of truth and corroboration by facts subsequently discovered,[29] is the self-interest felt by nearly all men in maintaining their innocence of crime. Experience teaches that men believe that their self-interest lies in freedom from punishment and disgrace, and do not *spontaneously* accuse themselves falsely;[30] in such a case, the self-interest of the accused in telling the truth, if he is innocent, is a guarantee of the testimonial worth of any confession that he makes. On the other hand, civilized peoples agree that torture renders a confession wholly unreliable because the accused is likely to believe that his self-interest lies in risking future scorn and punishment in order to end his present pain; a confession made

[29] The effect of such verification is discussed *infra*, p. 36, n. 38.

[30] The courts insure against the risk of convicting an innocent man who is abnormal in this respect by the rule requiring evidence corroborating the confession. See *Warszower* v. *United States*, 312 U. S. 342, 347.

during torture is not worthy of consideration. Between these two extremes, the question whether the confession has testimonial worth turns on whether the apparent interest of the accused in making a false confession was sufficient, even when balanced against his interest in maintaining his innocence, to create "a fair risk" or "reasonable probability" that the confession was false, thus rendering it improper for the jury's consideration.[31]

The traditional requirement of voluntariness seems to us to follow this analysis even though different words are used. Instead of speaking in terms of self-interest, the traditional requirement takes the identical premise, but expresses it by saying that an innocent man free to form his own judgment is so desirous of preserving his liberty and reputation that he will not make a false confession voluntarily no matter what the case against him. In this view, there is an excessive danger of falsity only if the confession was made under circumstances calculated to overcome the normal will of an innocent man, having the age, background, experience, and character of the defendant, not to accuse himself falsely.

If a promise held out by law enforcement officials[32] would overcome the normal resistance to

[31] Cf. *Lisenba* v. *California*, 314 U. S. 219, 236; 2 Wigmore, *op. cit.*, *supra*, § 824; American Law Institute, *Code of Evidence* (Proposed Final Draft) § 505.

[32] We shall assume throughout the case in speaking of promises, threats, and mistreatment that the actors are

making a false confession, then there is no guarantee of testimonial worth and the confession should be excluded. Similarly, if either actual mistreatment or threatened violence wears down that resistance, and fear of their repetition is stronger than the will to maintain innocence, then again, the guarantee of truthfulness is lacking. *Hopt* v. *Utah*, 110 U. S. 574, 585; 2 Wigmore, *op. cit. supra*, §§ 822–826; 2 Wharton, *Criminal Evidence* (11th ed., 1935), § 603.[33] The test of "voluntariness," we submit, is a shorthand expression of these criteria.[34]

"persons in authority" within the meaning of the decisions holding that misconduct by other persons will not vitiate a confession. See 2 Wigmore, *op. cit. supra*, §§ 827–830. We make the assumption because only law enforcement officials are involved in the *Anderson* and *McNabb* cases.

[33] In view of the number of state and lower federal court decisions on all phases of the admissibility of confessions, we shall make it our practice only to refer to secondary authorities, collecting and summarizing the cases, except in those instances in which we consider it persuasive on a critical point that the state decisions show a unanimous body of judicial opinion.

[34] A third form of expression is to say that a confession is inadmissible if induced by threats or promises, by fear or hope. Since there were neither threats nor promises in this case or in the *McNabb* case we need not consider whether this form of expression is undesirable because it suggests that any threat or any promise will render the confession inadmissible. See 2 Wigmore, *op. cit. supra*, § 825. In a case like the present, it is objectionable because it does not concentrate attention on the possibility that a false confession may be made by a defendant, not because he believes it to be in his self interest, but simply because fear or mental or physical debility have left him without the will power to repel an accusation of guilt. Cf. *Wan* v. *United States*, 266 U. S. 1.

Under this test, a confession to be voluntary need not be volunteered. Confessions made by an accused person in answer to questioning by the police may be voluntary. This corollary of the principle is critical in the present case for none of the petitioners, except possibly two,[35] volunteered his confession. Every accused person in custody, whether guilty or innocent, is under some compulsion to answer questions; he may feel that silence would be taken as a further indication of his guilt, and for that reason may attempt to explain away the case against him. Subsequently, the knowledge that his lies were ineffective and the normal human desire to unburden the conscience, or perhaps his estimate of the possibility of ingratiating himself with the prosecutor by telling the truth, may constrain him to confess if he is guilty. But there is nothing in a police examination calculated *per se* to overcome the normal will of an innocent man to maintain his innocence; there is no constraint to answer falsely. In view of that fact and of the uniformity in both federal and state decisions,[36] we

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[35] In the *Anderson* case, Felton Woodward confessed without having been questioned for several days immediately upon hearing Simonds state that he had made a confession. Hubbard also spontaneously confessed when he heard Simonds' story. See pp. 76–77, *infra*.

[36] 2 Wigmore, *op. cit. supra*, § 851; 2 Wharton, *op. cit. supra*, § 611. *Bram* v. *United States*, 168 U. S. 532, and the other decisions of this Court are discussed at length in connection with other policies requiring exclusion even of true confessions. See pp. 47–49, *infra*.

may take it as settled that confessions are not to be rejected for testimonial unworthiness merely because they are made reluctantly and in answer to questions from the police.

Likewise, the various unlawful acts sometimes committed by the police in tracking down criminals do not *per se* require a subsequent confession to be excluded for testimonial unworthiness. In the present case, for example, it is alleged (and in part denied) that the petitioners were arrested unlawfully, that one was kidnapped across a state line, that others were confined without a preliminary examination, and that several were denied counsel. These facts do not *per se* render the confessions too unreliable for use as evidence. An unlawful arrest, a lawless delay in arraignment, or the denial of counsel, will not inevitably cause an innocent man to accuse himself falsely. But such acts may well be part of the complex which breaks his will, and for that reason they are relevant. The ultimate question in dealing with the police examination and police misconduct, as with all other circumstances, is whether the only available guarantee of the truthfulness of a confession is lacking because the will of the accused not to confess falsely was overcome."

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[7] In determining the admissibility of a confession, one whose sole object is to admit evidence having testimonial worth will also take into account the extent to which the confession is corroborated. For example, Felton Woodward in his confession explained that he bought the dynamite under the name of "John M. Cash" at the Hercules Powder

It is important to observe that this test is partly subjective. A confession is voluntary only if *the defendant* made it voluntarily; therefore, in connection with the other circumstances, it is always necessary to take into account the defendant's age, sex, background, experience, and condition in life. Of course, the strength of the defendant's will not to accuse himself falsely cannot be measured precisely even with that information, but it is possible to formulate a workable idea of the strength of the normal man's will not to accuse himself falsely and to determine how far the defendant's will varies from normal as a result of peculiarities in his character. As we shall show below, this partly subjective character of the test is a strong reason for giving discretion in his ruling to the trial judge who alone can see the defendant and estimate his character.

2. Police practices in dealing with suspected criminals, and particularly in questioning them, sometimes outrun proper bounds in disregard of in-

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Company in Bessemer at a cost of between $20 and $25 (R. 510–512). Subsequently, the agents verified the fact (R. 819–820). Woodward could scarcely have known of this unless he spoke the truth in saying that he was "John M. Cash." Thus, the confession gains another indication of reliability and such indicia have been held to be of great importance in determining the question of admissibility. See 2 Wigmore, *op. cit. supra*, §§ 856–859. In the instant case, however, any circumstances requiring exclusion for unreliability would require exclusion regardless of the truth of the confessions (see pp. 48–49, *infra*), so that we need not consider this aspect of the doctrine.

dividual right, thus jeopardizing procedural and substantive liberties.[38] If all extra-judicial confessions were excluded from evidence, there would be less aggression against these liberties because the incentive would be largely removed.[39] On the other hand, it is essential that crime be detected and important that all data having testimonial worth be used to establish the guilt or innocence of the accused. Thus, there is a conflict between the demands of individual liberty and the public interest in efficient law enforcement. The test of voluntariness seems to us to resolve this conflict at the line marked by the Constitution. It should not, we submit, be modified by the courts to be more stringent.

a. The Constitution banishes all police practices resembling the tortures and tyrannies attributed to the Inquisition, the Star Chamber and the Court of High Commission.[40] The Fifth Amendment is based in part upon the twin convictions

[38] National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement* (Report 11, 1931) pp. 38–155; *Report of Committee on Lawless Enforcement of Law (Am. Bar Ass'n)*, 1 Am. M. of Police Science 573; Note, (1930) 43 Harv. L. Rev. 617; Booth, *Confessions, and Methods Employed Procuring Them* (1930), 4 So. Cal. L. Rev. 83.

[39] *Cf. Weeks* v. *United States*, 232 U. S. 383; *Nardone* v. *United States*, 302 U. S. 379; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Nardone* v. *United States*, 308 U. S. 338.

[40] For a history of such judicial methods and their causes, see Lowell, *The Judicial Use of Torture* (1897), 11 Harv. L. Rev. 220, 290.

that no man should be tortured whether he be guilty or innocent, and that under tyrannous procedures substantive liberties are insecure. Cf. *Chambers* v. *Florida*, 309 U. S. 227, 235–238. Lord Camden in 1762, in *Entick* v. *Carrington*, 19 Howell's State Trials 1029, stated the basic philosophy:

> It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust * * *. (P. 1073.)

In other words, as this Court has explained, the guarantees of the privilege against self-incrimination and of due process of law are limitations put upon the state in protection of the individual against invasions of "his indefeasible right" of personal security, personal liberty, and the privacies of life, where the right has not been forfeited by a conviction for crime. See *Boyd* v. *United States*, 116 U. S. 616, 630. But the constitutional prohibition is not laid upon only the most obnoxious practices. Even a restrained secret interrogation may gradually turn to mental or physical torture. Cf. *Brown* v. *Walker*, 161 U. S. 591, 596–597. Therefore, the accused is given the privilege, which he may choose to exercise or not as he pleases, to check the danger at the outset by refusing to answer any incriminating questions; if he refuses, the state must not use "physical or

moral compulsion to extort communications from him."[41]

The Constitution grants this privilege specifically by the provision in the Fifth Amendment that no man "shall be compelled in any criminal case to be a witness against himself,"[42] and it grants the privilege impliedly in the due process clause of the Fifth and Fourteenth Amendments. Both the privilege and this aspect of the due process clause stem from a single background and have an identical aim.[43] The purpose is to protect the liberties of the accused and not through a false sense of mercy, or of fairness in the sporting sense, to exclude damning evidence.[44]

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[41] *Holt* v. *United States*, 218 U. S. 245, 252–253.

[42] U. S. Const., Amend. V.

[43] Wigmore, *op. cit., supra*, § 2250; Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination In America* (1935), 21 Va. L. Rev. 763; *Chambers* v. *Florida*, 309 U. S. 227, 235–238.

[44] Cf. 2 Wigmore, *op. cit. supra*, § 803. The astringent writing of Jeremy Bentham should be sufficient to explode the notion that a defendant's statements are to be excluded because it is unkind to convict a man upon his own admissions ("the old woman's reason"), or because to use them is so "unfair" in the sense of "unsporting" that society must be denied the use of the evidence in order to match the trial between it and the criminal more evenly ("the fox-hunter's reason"). VII Bentham's Works (Bowrings ed., 1843), p. 452. But cf. Note (1894) 8 Harv. L. Rev. 281.

There appears to be considerable difference of opinion as to whether the privilege against self-incrimination is violated by use of an involuntary extra-judicial confession. Professor Wigmore has argued that it is not, because the

The scope of the constitutional guarantee is shown both by the words of the constitutional guarantee and by the decisions of this Court. The privilege is not to be "compelled" to give evidence against oneself. And in the leading cases

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privilege is one to be free from testimonal compulsion; and this view has met with wide acceptance. See 2 Wigmore, *op. cit. supra*, § 823, 4 Wigmore, *op. cit. supra*, § 2252; Note (1940) 49 Yale L. J. 1059, 1063, n. 17, 1071, n. 70. But the decisions of this Court appear to adopt the opposing view. *Bram* v. *United States*, 168 U. S. 532; *Wan* v. *United States*, 266 U. S. 1, 5, n. 6. See also Chafee, *The Progress of the Law, 1919–1922—Evidence*, 35 Harv. L. Rev. 428, 439. Logically and practically there is no real difference between torture in the courtroom to compel a witness to testify and torture outside to obtain a confession to read at the trial. See *Brown* v. *Mississippi*, 297 U. S. 278, 285–286; *Lisenba* v. *California*, 314 U. S. 219, 237. The scope of the privilege is not to be limited by technical notions of the scope of a "criminal case" but "is as broad as the mischief against which it seeks to guard." See *Counselman* v. *Hitchcock*, 142 U. S. 547, 562. In any event, the federal government like the states may not deny due process of law and there is a denial of due process "when a coerced confession is used as a means of obtaining a verdict of guilt." *Lisenba* v. *California*, 314 U. S. 219, 236–237.

In addition to the purpose to exclude coerced confessions, whether true or false, the due process clause also guarantees defendants trials calculated to ascertain the truth. Thus, convictions after trials which are a sham on account of mob domination or fraud and subornation of perjury on the part of the state, are nullities because they deny the accused due process of law. *Moore* v. *Dempsey*, 261 U. S. 86; *Mooney* v. *Holohan*, 294 U. S. 103. It would seem that this reasoning might be applicable to overturn a conviction based upon an extorted confession. Cf. *Brown* v. *Mississippi*, 297 U. S. 278; see p. 32, *supra*. But to whatever extent it may be applicable, the appropriate criteria have been discussed in the preceding section.

setting aside convictions based upon confessions because due process was denied, the Court carefully pointed out that "the undisputed facts showed that compulsion was applied." *Chambers* v. *Florida*, 309 U. S. 227, 239; cf. *Brown* v. *Mississippi*, 297 U. S. 278. But there is no right not to be asked incriminating questions, and a voluntary confession is among the most effectual proofs. *Hopt* v. *Utah*, 110 U. S. 574, 585.

Coercion and compulsion exist in this sense when the accused is deprived "of his free choice to admit, to deny, or to refuse to answer," when his will is broken so that he will make whatever statement his inquisitors may desire. *Lisenba* v. *California*, 314 U. S. 219, 241; *Ward* v. *Texas*, No. 974, last term, decided June 1, 1942. This statement is to be read, we submit, to fulfill the aims which we described above. Examples applying it may be found in recent decisions of the Court. A confession obtained from a Chinese suffering physical pain, who was held *incommunicado* and questioned for seven days and all of one night, is obtained by compulsion. *Wan* v. *United States*, 266 U. S. 1. To question an ignorant negro for a week, culminating in an all-night session, after an unlawful arrest and in an atmosphere charged with indignation, arousing haunting fears of mob violence, and to use his confession to convict him, denies due process of law. *Chambers* v. *Florida*, 309 U. S. 227. See also *Brown* v. *Mississippi*, 297 U. S. 278; *Canty* v. *Alabama*, 309 U. S. 629; *White* v. *Texas*,

310 U. S. 530; *Lomax* v. *Texas*, 313 U. S. 544; *Vernon* v. *Alabama*, 313 U. S. 547; *Ward* v. *Texas*, No. 974, last Term, decided June 1, 1942. But although lawless and demanding severe censure, prolonged and severe questioning in which incriminating evidence is pressed upon the accused does not require exclusion of a confession, even though the accused had earlier been unlawfully detained, if the accused retained his free will and self-possession. *Lisenba* v. *California*, 314 U. S. 219.

Under this constitutional standard, obnoxious police practices are not *per se* cause for excluding a confession made after their occurrence. Lawlessness by the police is relevant to show whether the state subjected the accused to "physical or moral compulsion to extort communication from him," [45] but if his will was not impaired, the confession is admissible and the wrongs find other remedies. *Lisenba* v. *California, supra.*

Petitioners base much of their argument on a contrary view. They argue that "the illegal arrest and failure to arraign", as well as the absence of counsel at the interrogations, "were in themselves sufficient to warrant the exclusion of the confession" regardless of whether *in fact* those circumstances rendered the confessions involuntary (Br. 45). This view, petitioners assert, is supported by the concluding language of

[45] *Holt* v. *United States*, 218 U. S. 245, 252–253.

Ward v. *Texas*, No. 974, last term, decided June 1, 1942.[46]

We submit that petitioners' argument on this point is without merit. The cases cited by the Court, as well as the express language of the opinion, make it clear that in the *Ward* case the Court applied the very principles that we have discussed and concluded the undisputed facts there presented showed as a matter of ultimate fact "that petitioner was no longer able freely to admit or to deny or to refuse to answer, and that he was willing to make any statement that the officers wanted him to make" (pamph., p. 7). Again, that the Court did not intend to pronounce the rule which petitioners advocate, is plain from the very paragraph upon which they rely, for if mere "illegal detention" renders a confession *per se* involuntary, it would have been superflous for the Court to emphasize that the convictions which it had set aside were based upon confessions "extorted from ignorant

[46] The passage reads pamph. p. 7): "This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal. All of them are to be found in this case" [citing *Wan* v. *United States*, 266 U. S. 1, 14; *Brown* v. *Mississippi*, 297 U. S. 278; *Chambers* v. *Florida*, 309 U. S. 227, 241; *Canty* v. *Alabama*, 309 U. S. 629; *White* v. *Texas*, 310 U. S. 530; *Lomax* v. *Texas*, 313 U. S. 544; *Vernon* v. *Alabama*, 313 U. S. 547.]

persons." Furthermore, it can hardly be assumed that the Court in the *Ward* case overruled *sub silentio* both the well established rule that the question is whether upon all the facts the confession is voluntary and the recent decision in the *Lisenba* case.

It also follows from the nature of the constitutional restrictions that the Constitution does not forbid the Government to use a statement made by the accused in answer to questions by the police. The constitutional restrictions are designed to protect the individual against misconduct by the sovereign. The normal police examination is often successful in securing confessions from the guilty for two psychological reasons. The first is that many guilty men feel compelled to answer questions concerning their activities at the time of a crime for fear that silence will convince the police of their guilt. If this occurs, the second psychological reason may operate: if the accused realizes that his lying is unsuccessful in persuading the police of his innocence, he will tell the truth and confess voluntarily in order to relieve his mind. Proper police examination, therefore, consists, first, in hearing the details of the initial story and, later, in calling to the attention of the accused, if he is guilty, that it is useless to continue lying because his stories have been shown by investigation to be false or because he himself exposes their falsity by the inevitable inconsistency in the details of his state-

ment. That is essentially what occurred in the present case. Simonds volunteered a false statement on Thursday; he admitted that he was treated "nice enough" on that occasion. Friday and Saturday F. B. I. agents checked his story; he himself was not questioned except for two separate half-hour periods. On Sunday he was told that the investigation had proved his story false. Almost at once he confessed; and when they learned of Simonds' confession, Hubbard and Woodward made complete statements without being interrogated. See pp. 11–12, 16, 18, *supra*. There was simply a normal and sensible check by the police—who were scarcely bound to accept whatever version Simonds chose to tell—of Simonds' story. Once the falsity of the story was discovered by this entirely reasonable check, and the police knowledge of its falsity was disclosed to Simonds, the dam broke without more. In all of this there was nothing unlawful, nor any violation of constitutional right. An accused person feels compulsion to speak, at the outset, in the hope of establishing his innocence and, at the end, when that is gone, in the weight of his conscience, or in the hope of obtaining leniency. But in such a case the state cannot be said to have coerced the answers. The state has not invaded any right of personal security or privacy against the will of the accused, or exerted moral or physical compulsion to extort the communication. Such a confession, therefore, is admissible. See cases collected p. 48, *infra*.

Bram v. *United States*, 168 U. S. 532, should not be taken as contrary to our analysis. Although the opinion will support an argument that Bram's statement was held involuntary because he was questioned under such circumstances that he may have believed that silence would be taken by the detective as an admission of guilt, nevertheless, the decision does not go so far as to hold that a confession made in response to police questioning is *per se* involuntary. Mr. Justice White emphasized four other facts as essential to his conclusion: (1) Bram was alone in the room of the detective, (2) in a foreign land, (3) stripped of his clothing (this was emphasized in italics in the statement of facts)[17] and (4) under the complete authority and control of the detective (p. 563). Moreover, the judgment of reversal was equally rested on the ground that Bram was offered an "inducement" to confess by the statement, "If you had an accomplice you should say so, and not have the blame of this horrible crime on your own shoulders" (p. 564).

Any contrary interpretation of the *Bram* case would place it out of harmony with the other decisions of this Court. As we have pointed out, any accused person interrogated by the police is under some pressure to speak, and no confession made in answer to questioning by the police is "voluntary" in the sense that it is volunteered. Before

[17] It has been suggested that the stripping carried a silent threat that Bram was to be whipped.

the *Bram* case it was well settled that the courts would admit confessions made in answer to police questioning by a prisoner under arrest unless the confessions were otherwise shown to be the result of inducements or coercion. *Hopt* v. *Utah*, 110 U. S. 574, 584; *Sparf and Hansen* v. *United States*, 156 U. S. 51, 55; *Pierce* v. *United States*, 160 U. S. 355, 357; *Wilson* v. *United States*, 162 U. S. 613, 623. After the *Bram* case, Mr. Justice Brandeis said for the Court in *Wan* v. *United States*, 266 U. S. 1, 14:

> A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them.

And the Court expressed the same conclusion in other cases. *Hardy* v. *United States*, 186 U. S. 224, 229; *Powers* v. *United States*, 223 U. S. 303, 314; *Bilokumsky* v. *Tod*, 263 U. S. 149, 157; *cf. Lisenba* v. *California*, 314 U. S. 219, 239. We may accept it as an established principle, therefore, that a confession made in answer to interrogation by the police may be admitted in evidence without infringement of any constitutional right, provided that the accused is left free to end the examination into his guilt or innocence by a refusal to answer, and provided that his will is respected and not subjugated to the will of his accusers.

Comparison of the constitutional requirement with the criterion of testimonial worth shows that they are essentially the same both in abstract

statement and in practical application. Both are summarized in the words "voluntary" and "compulsion." And in practice, just as it is possible to estimate the strength of a man's will to refrain from accusing himself falsely, so is it possible to judge with sufficient accuracy whether the state, taking advantage of pain, fear, despair, or fatigue, overcame the will of the accused to end the questioning. In theory, it may be that a man is less ready to accuse himself falsely than he is to surrender his will to remain silent, but it is doubtful that so fine a line can be drawn in practice. The two aims, to admit true confessions and to abolish abuses, are overlapping; the ultimate test in each case is whether the confession is what the accused was willing to say or what the accusers wished him to tell them.

b. The Constitution, however, does not necessarily mark the full extent to which the Court may go in excluding evidence in order to improve police efficiency and to protect the individual by discouraging improper police practices. In the exercise of its power to formulate rules of criminal evidence for the federal courts,[48] the Court is free, within the limits of the judicial function, to formulate stricter standards of admissibility than are required to exclude testimonially worthless confessions and to enforce constitutional provisions. Thus, the Court might hold inadmissible a confes-

[48] *Funk* v. *United States*, 290 U. S. 371, 382.

sion made during the subsistence of any unlawful police practice regardless of whether the confession was voluntary. Or the Court might even exclude every confession made in the course of an examination by the police, thus in effect admitting confessions as evidence only upon proof that they were spontaneous or volunteered. But, we submit, to adopt either rule, or any other rule going beyond the requirements of reliability and the constitutional guarantees, would be contrary to the great weight of judicial opinion and, more important, in principle ~~otherwise.~~ unwise.

Unlawful arrests, delays in arraignment, and similar practices are interferences with individual liberty requiring censure and punishment. But it would seem too clear for argument that the courts should not be required to exclude a confession in *every* case in which it follows upon an unlawful act of the police. Where the unlawful act rests upon a technicality, it would have a destructive effect upon police and public morale to exclude damning evidence and allow the resulting acquittals merely because there was a violation of rules. Likewise, the trial of a criminal cause should not be interrupted and the continuity of the evidence before the jury destroyed by collateral inquiries every time it is suggested that there may have been unlawful conduct by the police in securing evidence. Even where the unlawfulness is a substantial violation of private rights (falling short of a violation of the Constitution), the exclusion of

confessions having high probative value, and the resulting acquittal of criminals is too high a price to pay in addition to other available sanctions to secure law observance by the police. Hitherto only constitutional rights have been thought to rank high enough to warrant such security. *Cf. Adams* v. *New York*, 192 U. S. 585; *Hester* v. *United States*, 265 U. S. 57; *Olmstead* v. *United States*, 277 U. S. 438; *Goldman* v. *United States*, 316 U. S. 129. We submit that the same rule should be applied to confessions and that illegality should be cause for exclusion of a confession only when it has been obtained in violation of the Constitution. The state courts with substantial uniformity have admitted in evidence extrajudicial confessions made voluntarily after such improper conduct as unlawful searches,[49] unlawful arrests,[50] delays in the preliminary examination,[51] or the exclusion of friends and counsel,[52] although they have recognized of course

[49] *Milbourn* v. *State*, 212 Ind. 161; *Quan* v. *State*, 185 Miss. 513.

[50] *Ivey* v. *State*, 4 Ga. App. 828, 831; *State* v. *Westcott*, 130 Iowa 1, 6; *State* v. *Raftery*, 252 Mo. 72; *People* v. *Trybus*, 219 N. Y. 18.

[51] *People* v. *Devine*, 46 Cal. 45; *People* v. *Vinci*, 295 Ill. 419; *Hicks* v. *State*, 213 Ind. 277, 291, certiorari denied, 304 U. S. 564; *Commonwealth* v. *Di Stasio*, 294 Mass. 273; *Commonwealth* v. *Mabey*, 299 Mass. 96; *State* v. *Wickman*, 39 N. M. 198; *People* v. *Doran*, 246 N. Y. 409; *People* v. *Alex*, 265 N. Y. 192.

[52] *Dewein* v. *State*, 114 Ark. 472; *State* v. *Cross*, 72 Conn. 722, 728; *State* v. *Van Vlack*, 57 Idaho 316, 343; *People* v. *Nelson*, 320 Ill. 273, 280; *State* v. *Neubauer*, 145 Iowa 337, 339–340; *State* v. *Heinz*, 223 Iowa 1241, 1253; *State* v. *Hale*,

that such circumstances are highly relevant in determining whether *in fact* the confession is voluntary. Such restraint leaves the way open for Congress to apply a sanction whenever it thinks wise and subject to any limitations it deems desirable.[53]

We submit also that the Court should not adopt an even more extreme rule requiring the exclusion of confessions obtained during cross-examination of persons in the custody of the police. The shocking conditions revealed by appellate court decisions and by the researches of investigators[54] naturally give rise to the suggestion that the evils must be ended by abolishing the system of police examination which lies at the root of the evils. The ability to use as evidence confessions obtained by cross-examination is said to lead a lax police force to rely upon confessions and not upon sound investigatory techniques in tracing clues and uncovering evidence.[55] Similarly it is suggested

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ton, 131 Kan. 138, 139; *McCleary* v. *State*, 122 Md. 394, 400-404; *Wright* v. *State*, 177 Md. 230, 235; *People* v. *La Panse*, 255 Mich. 38, 42; *State* v. *McGuire*, 327 Mo. 1176; *State* v. *Evans*, 345 Mo. 398, 406; *State* v. *Richardson*, 340 Mo. 680, 686; *State* v. *Murphy*, 87 N. J. L. 515; *State* v. *Vaisa*, 28 N. M. 414, 417; *State* v. *Gorham*, 67 Vt. 365.

[53] Compare *Olmstead* v. *United States*, 277 U. S. 438, and *Nardone* v. *United States*, 302 U. S. 379.

[54] See authorities cited p. 38, n. 39, *supra*.

[55] 4 Wigmore, *op. cit. supra*, § 2251. Stephen, 1 *Hist. Cr. L.* (1883) p. 442 note: "There is a great deal of laziness in it. It is far pleasanter to sit in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."

that proper interrogation too easily becomes bullying and bullying becomes brutality.[56] The evil effects of the resulting "third degree" upon the whole system of law observance and law enforcement can scarcely be exaggerated.[57] Finally, proponents of this view point to the low rate of crime and high rate of crime detection in Great Britain where, apparently, the police are not permitted to interrogate a prisoner except to clarify a volunteered statement.[58]

But there are important considerations on the other side. The parallel with Great Britain is questionable because of difference in geographical conditions, mobility, homogeneity, and psychology towards the police.[59] Further, it has been suggested that in many localities better administration and

[56] *Cf. Brown* v. *Walker*, 161 U. S. 591, 596–597; Wigmore, *loc. cit. supra*, n. 54.

[57] Report of National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement* (Report 11), pp. 180–192. On the value of the "third degree" in its various forms, see Beyle and Parratt, *Approval and Disapproval of Specific Third Degree Practices* (1938), 28 J. Crim. Law and Criminology 526.

[58] Home Office Memorandum, reprinted 7 Can. Bar. Rev. 176, 177–178. But see 167 Law Times 257, 343; 73 Sol. J. 199, 246. It is said to be doubtful whether any statements made to the police after arrest are admissible in the English courts. See Report of National Commission of Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement* (Report 11), p. 53. See also the summary of the *Savidge* case, *id.* p. 259.

[59] Warner, *How can the Third Degree be Eliminated* (1940), 1 Bill of Rights Rev. 24, 28–30.

the divorcement of law enforcement from political corruption would often improve morale and make it possible to restrain police questioning within proper limits."[90] So limited, the police examination serves a useful and legitimate function. In acquiring "leads," uncovering alibis and gaining information, the police must examine persons connected with the crime and none is likely to be a more fruitful source of information than a person suspected of engaging in it. Sound investigation requires a combination of examination and outside research, each of which would be less effective without the other.[91] The detection and conviction of criminals is not a game in which the weapons of the police must, to even the strength of the contending sides, be limited, nor is a trial on the issue of guilt or innocence an occasion for excluding evidence out of mercy.[92] "Fundamental unfairness" in this connection means a fundamental respect for the right of a guilty man to be free from abuse, and not a fair chance to escape punishment. It may be

[90] Booth, *loc. cit. supra*, n. 38; cf. Warner, *op. cit. supra*, n. 38, at p. 31.

[91] Report of National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement* (Report 11), p. 174: "In spite of this danger of abuse of ordinary police questioning, most observers in this country seem in agreement that the risk must be run because of the utility of the practice when kept within lawful limits."

[92] Bentham, *loc. cit. supra*, n. 45.

wise, therefore, to permit and perfect techniques for rational police examination, subject to proper control, rather than to suppress the practice.

But this is not the forum in which to choose between the alternatives. At the present time the law is well settled that confessions made in the course of a police examination after sharp questioning are admissible in evidence. See pp. 35–36, 47–48, *supra*. If a remedy is needed in addition to existing sanctions, the remedy should be administrative or legislative but not judicial. Two reasons support this conclusion. First, the courts are ill equipped to make the investigation necessary before the settled principles may be overturned. Second, the courts have no discretion in the choice of a remedy. The administrative officials may prescribe and enforce regulations designed to protect prisoners against the "third degree." If the legislative branch determined to forbid interrogation by the police and to exclude extrajudicial confessions thus obtained from evidence, it might meet the demands of law enforcement by providing a substitute such as an immediate examination by the prosecuting attorney in the presence of the counsel for the accused, or perhaps some system of quasi-judicial examination accompanied by a limitation, by constitutional amendment where necessary, of the privilege against self-incrimina-

tion.[63] But the courts can supply a remedy only at the expense of hindering proof at the trial and hampering enforcement of the criminal law; for the only remedy which they could prescribe would be to exclude confessions regardless of their probative value even though no constitutional rights of the accused had been violated.

Although *Bram* v. *United States*, 168 U. S. 532, taken alone might seem to support a contrary conclusion, it is clear that this Court has continuously held to be admissible confessions made during police examination. See pp. 47–48, *supra*. The state courts have held so unanimously.[64] We submit that this Court should adhere to that rule and exclude confessions obtained by questioning only when the duration and manner of questioning or other misconduct has broken the will of the defendant or subjugated it to the will of his interrogators in denial of his constitutional rights or in such a way that his confession is likely to be false.

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[63] Pound, *Legal Interrogation of Persons Accused or Suspected of Crime* (1934), 24 J. Crim. Law and Criminology 1014; Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree* (1932), 30 Mich. L. Rev. 1224; Hartshorne, *The Elimination of the Third Degree*, New Jersey L. J., April 9, 1942, p. 1; *Report of Committee on Lawless Enforcement of Law*, 1 Am. M. of Police Science 573, 593. But see Gardner, *Criminal Procedure in France* (1916), 25 Yale L. J. 225.

[64] 2 Wharton, *op. cit. supra*, § 611.

B. THE DECISION OF A TRIAL COURT THAT A CONFESSION IS "VOLUNTARY" SHOULD NOT BE REVERSED UNLESS IT WAS UNREASONABLE AND CONSTITUTED AN ABUSE OF DISCRETION

The aims and content of the rule which admits voluntary confessions and excludes those which were coerced, makes it apparent that in every case the trial court is called to rule upon an issue which is essentially a question of fact. *Wan* v. *United States*, 266 U. S. 1. The trial court's conclusion must depend upon the surrounding circumstances, upon the conduct of the police, upon the age, sex, experience, background and personality of the defendant and finally upon the impact of the one upon the other. The necessity of resolving conflicts in the testimony, of drawing inferences, of reliving past events in others' lives, and of forming a delicate judgment thereon, makes the issue of voluntariness, like such issues as due care and reasonableness, the kind customarily left by appellate courts to the court of first instance. The courts have often recognized this, pointing out the generality of the exclusionary rule and the importance of every circumstance. See, *e. g.*, *Hopt* v. *Utah*, 110 U. S. 574, 583.

One settled consequence of this characteristic of the inquiry is that an appellate court ordinarily will not upset the decision of the trial judge upon the credibility of the witnesses. Cf. *Lisenba* v. *California*, 314 U. S. 219; *Ward* v. *Texas*, No. 974, last Term, decided June 1, 1942. This consequence is important in both the instant case and the

McNabb case, for in both the petitioners' claims are based very largely upon testimony given by them but deliberately denied by witnesses for the Government whom the trial judge believed to be truthful.

A second consequence of the character of the inquiry is the need for giving the trial court scope for the exercise of discretion in addition to its powers to resolve direct conflicts in the evidence. The need exists chiefly because the trial court has a far better opportunity than the appellate tribunal to form the final factual judgment. The inferences to be drawn or rejected depend upon more intangible impressions than the bald conclusion that A told the truth as to a fact about which B lied; perhaps C, an overeager witness, exaggerated or D was plainly a dull and unobservant fellow. Likewise, a judge who has sat through the trial can recapture the atmosphere and the nuances of the events involved far more accurately than an appellate bench one or two steps further removed from them. This difference in opportunity is never greater than in determining whether a confession is voluntary. For example, the ruling must depend to a large and often decisive extent upon the personalities of the police officers and the defendant and upon their effect on one another. This was clearly pointed out in *State* v. *Squires,* 48 N. H. 364, 368:

> It is obvious also that what might affect one person greatly, might have no effect

> whatever upon another. So in weighing the evidence on this point much may depend upon the appearance of the witness who is to testify to the confessions, and his manner of stating what inducements were held out, if any; and from the nature of the case the decision of the court may in many cases be greatly and properly influenced by circumstances in the appearance of the witness or the respondent that could not be reported for the consideration of the whole court.

Because a trial court has a better opportunity to find the ultimate fact of whether a confession was voluntary, the appellate courts should exercise a wise restraint and leave the trial courts wide discretion.

An additional reason for leaving latitude to the trial court in this field is that the court in turn usually permits the jury to review its judgment as to whether the confession was voluntary.[55] In the instant case the court charged the jury (R. 831)—

> * * * I instruct you that before you can consider the confessions of the defendants, or any of them, you must first find that they were freely and voluntarily made, without fear or compulsion, or hope of reward. In determining this matter you will take into consideration all the facts and circumstances in evidence before you bearing on this subject; that is the way

[55] *Wilson* v. *United States*, 162 U. S. 613, 624.

> and manner in which confession or admission was obtained. * * * In passing on this question you will consider the age, experience, education, station in life and physical condition of the defendants; whether they have friends, relatives or counsel present; whether the questioning was carried on in an unreasonable manner and at unusual hours; whether or not they or any of them had been given drugs; whether they had sleep or food, whether or not they were kept in a private building or abused or cursed and forced to do other acts against their will.

Under such a charge the jury's verdict is likely to be based upon a sound judgment as to whether the police have trampled upon individual liberty; experienced observers have commented upon the large numbers of acquittals of apparently guilty men occurring when the jury sensed that the police had done the prisoner injustice by extorting a confession.[28] Moreover, after seeing and hearing the witnesses, a jury has an ability to pass judgment upon a situation that developed in its local community which cannot be approximated by an appellate court reading a cold record. Certainly, then, the judgment of both a trial judge and a jury should not be lightly overturned, even though on the bare undisputed facts which the record shows the appellate court might reach a contrary conclusion. Their conclusion should be

[28] Glueck, *Crime and Justice* (1936), 76-77.

reversed only when the record shows that it was unreasonable.

The state courts have uniformly held that in admitting or excluding evidence of an extrajudicial confession, much latitude must be left to the trial judge. In eighteen states there are no conclusive decisions. Of the remaining thirty, twenty give the trial judge "wide discretion," "discretion," or "considerable discretion" and eight others do not overturn his ruling unless "clearly against the evidence." Only two have expressed the view that once the conflicts in the evidence are resolved the question is one of law. (See Appendix, *infra*, pp. 94–98.) The lower federal courts have followed the weight of the state decisions,[87] and commentators approve the principle.[88] We submit that this Court should adopt the same guide.

The precedents in this Court do not stand in the way of dividing the functions of trial and appellate court in the manner which we advocate. In the recent decisions in cases coming from state courts, this Court has held that it was not foreclosed by the findings of two courts and a jury from examining the facts. *E. g. Chambers* v. *Florida*, 309 U. S. 227, 229, n. 4. But the decisions, as the line

[87] *Pearlman* v. *United States*, 10 F. (2d) 460 (C. C. A. 9); *Lewis* v. *United States*, 74 F. (2d) 173 (C. C. A. 9); *Hale* v. *United States*, 25 F. (2d) 430 (C. C. A. 8); *Mangum* v. *United States*, 289 Fed. 213.

[88] Greenleaf, *Evidence*, § 219; 2 Wigmore, *op. cit. supra*, § 861; 2 Wharton, *op. cit. supra*, § 597.

of authorities cited makes clear, go only to the point that examination of a federal question cannot be shut off by the state court's finding of fact. Similarly, we think that the Court's practice of accepting the undisputed facts and concluding from them whether or not there had been a denial of due process, cannot be taken as impliedly holding that the triers of fact have no discretion once the subsidiary facts are established.[69] Indeed, the opinion in *Lisenba* v. *California*, 314 U. S. 219, suggests that the Court has applied the test which we advocate; the Court said (pp. 238, 240):

> * * * In such a case, we accept the determination of the triers of fact, unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.
>
> * * * Our duty, then, is to determine whether the evidence requires that we set aside the finding of two courts and a jury, and adjudge the admission of the confessions so fundamentally unfair, so contrary to the common concept of ordered liberty, as to amount to a taking of life without due process of law.
>
> * * * * * * *
>
> * * * But on the facts as we have endeavored fairly to set them forth, and in

[69] Compare the rule as to administrative agencies as shown by *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105; *Gray* v. *Powell*, 314 U. S. 402; *Wilmington Trust Co.* v. *Commissioner*, 316 U. S. 164.

> the light of the findings in the state courts, we cannot hold that the illegal conduct in which the law enforcement officers of California indulged, by the prolonged questioning of the prisoner before arraignment, and in the absence of counsel, or their questioning on May 2, coerced the confessions, the introduction of which is the infringement of due process of which the petitioner complains. * * *

And there can be no doubt that even if wide discretion was allowed to the triers of facts, reversal was required in the cases in which this Court has set aside convictions as based upon a coerced confession.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE CONFESSIONS IN EVIDENCE

The voluntary or involuntary character of the confessions made by petitioners Simonds, Hubbard, Woodward, Rhodes, Queen, and Ballew must be judged by the complex of circumstances under which each was made. Nevertheless, it is appropriate to analyze the diverse elements affecting each at the outset. Thereafter, we shall show that, viewing the circumstances as a whole, it becomes certain that the confessions were voluntary.

1. The confessions were made by the petitioners

Although each of the petitioners denied that he had told the F. B. I. agents any of the things in the confession signed by him (R. 654, 655, 668, 683, 694–695, 698, 736, 748), the agents testified that each con-

fession was made by the petitioner to whom it was attributed (R. 411–412, 444–445, 501, 517–518, 524, 526–527). The court resolved the issue of credibility against the petitioners and its decision is final. (See p. 57, *supra*.)

The finding that Ballew was not deceived into signing his confession is also final. Whitten and Lunsford, who took the confession, denied Ballew's claim[16] that the paper which he signed was concealed from him and represented to be a release (R. 803, 813). Each swore that Ballew read the confession and that it was read to him (R. 803, 812–813).

The fact that petitioners falsely denied making confessions does not bar them from contending that the confessions were obtained by compulsion and duress. *White* v. *Texas*, 310 U. S. 530. But the initial lie, and the inconsistency between the claim "I made no confession" and the claim "I confessed because I was coerced," would quite properly influence the trial court in deciding whether the claim of coercion was predicated upon false and exaggerated testimony.

2. *The confessions were not induced by promises of reward*

Petitioners also contend that their confessions were obtained by promise of parole and "of favorable treatment in the form of low bail

[16] R. 756.

bonds" (Br. 30–33, 41, 46). It is to be noted however, that neither Queen nor Rhodes nor Ballew made any such claim at the trial, and that the testimony of Simonds, Hubbard, and Woodward was specifically and categorically denied by witnesses for the Government (see pp. 12–13, 16, 19–20, *supra*). This conflict has been "conclusively resolved" by the triers of fact, and, therefore, petitioner's testimony furnishes no basis for their contention in this Court. (See p. 57, *supra*.)[11]

Petitioners, however, bottom their charge of inducement upon the testimony of Campbell, a deputy sheriff, who said that he had told "four or five of the men in custody that Agent Plaxico had said he would recommend a parole for those boys that come clean" (R. 273). Plaxico denied that he had made such a statement to Campbell but testified that Campbell had asked him to recommend leniency and that he had replied that all he could do would be to tell the facts. (R. 318, 493). This talk between Plaxico and Campbell, however, took place *after* the confessions had been signed (R. 318, 493), so that it is likely that Campbell's

[11] Petitioners also refer (Br. 46) to the testimony of the United States Commissioner that Agent Mann had requested lower bail bonds for the defendants who pleaded guilty and that Woodward's bond be reduced, as corroborating their claim of inducement. But the trial court was not required to believe his testimony, for the agents contradicted it. (See p. 19, *supra*.)

conversation with the men in custody occurred even later. Campbell could not remember the date (R. 272), and petitioner's argument (Br. 32–33) that Campbell would use the expression "come clean" only in the future tense is scarcely persuasive in the face of Plaxico's sworn statement that he talked with Campbell after the confessions had been made. Moreover, there was no evidence that Campbell talked about parole to any of the petitioners—others were in custody—or that any of the petitioners were told what he said. Not one of the petitioners claimed that Campbell offered any improper inducement to him.

It follows that the finding of the trial court that the confessions were not induced by promises of favor should be sustained.

3. The confessions were not induced by physical mistreatment or threats of violence

On this aspect of the case we may lay aside at once the confessions of Rhodes, Queen, and Ballew. Rhodes spent but one night in jail; he made no claim that he suffered or was threatened with physical mistreatment (see pp. 20–21, *supra*). Queen was in jail only 24 hours before he confessed and complained only that he had no supper the first night (R. 682–683). Ballew, who had been detained for only about 24 hours (R. 746, 756), himself admitted that during the questioning "nobody cussed me out

and I was not abused or threatened" (R. 758; cf. R. 747).

We may also quickly dispose of such claims of abuse by the federal agents as were made by Simonds, Hubbard, and Woodward. Simonds complained that he was cursed as a liar and that on one occasion Mann "slung" back his hand and showed a blackjack or gun (R. 231–232, 239–240; R. 658). But the agents contradicted him upon both points (R. 186, 276, 277, 289, 290, 372; R. 472, 787, 791, 820). Hubbard's testimony that he was deprived of his glasses (R. 204–205), "pushed up straight" in a straight-backed chair (R. 204–205; R. 667), and denied water and cigarettes (R. 207; R. 667, 668, 670) was disputed by the agents (glasses: R. 183, 299, 324, 346, 359, 368, 387; R. 435, 491, 497, 506, 789, 791; smoking: R. 299, 324, 325, 345–346, 359–360, 369, 385; R. 435, 497, 506, 788, 791, 808; cursing: R. 186, 281, 299, 324, 325, 346, 360, 372, 386; R. 492, 788–789, 800; pushing up in chair: R. 325, 346, 360, 369, 386; water: R. 325, 360, 368, 385). Woodward testified that Morgan forbade him to smoke (R. 257) and Morgan did not testify specifically upon the point. But Morgan talked to Woodward on but one occasion and then for only fifteen minutes so that Woodward's enforced abstinence is a triviality (R. 388–389).[72]

[72] Woodward testified that Morgan questioned him for a much longer period (R. 251, 252, 256) but on this point, as on other points on which the testimony conflicts, we accept the findings of the trial court.

There is no showing that Simonds, Hubbard, and Woodward suffered discomforts tending to impair their wills as a result of bad food and cramped sleeping quarters supplied by the sheriff. Simonds testified that from Wednesday noon through Friday breakfast he was given nothing but bologna sandwiches and coffee to eat, and that the coffee appeared to have been drugged (R. 225–228; R. 654, 678–679). He was not asked questions concerning his other meals. Neither did he say where he slept, except that Wednesday night he, Woodward "and maybe someone else" shared a seven by nine-foot cell in the city jail (R. 225; R. 652). Hubbard complained that he had no food on Saturday after making his breakfast on two bologna sandwiches and bad coffee (R. 206–207, 215; R. 667); he did not assert, however, that the food was bad on any other day. Hubbard also testified that on Thursday night he slept in a room with the deputy sheriffs (R. 202) and on Friday night was placed with three other men, including a drunk, in a small cell in the city jail (R. 203). He said nothing of where he slept on the other nights. Woodward's testimony was more extreme. He said that on Wednesday night he was given no supper (R. 247–248; R. 690); that on Thursday he had bologna for breakfast and lunch and no supper (R. 248–249; R. 690); on Friday morning he was served more bologna and bad coffee—as to lunch and supper, he did not say (R. 250–251; R.

691); Saturday was like Friday (R. 252); on Sunday he was given nothing to eat.

But the trial court was not obliged to believe this testimony; and it did not (R. 403). The court found that these witnesses had sworn falsely on other points (see pp. 63–65, *supra*); their claim, repeated here (Br. 37), that they lost as many as forty pounds in six days, could be received with skepticism, to say the least, even though it was not directly contradicted.

The petitioners' testimony was contradicted in substance. Agents Roche and Hevron testified that they had had reason to believe that the defendants were well treated, and that therefore they had not checked further into the matter (R. 174, 188–189, 355; R. 429–430, 433, 435–436, 440–441). There was also evidence that Simonds (R. 188–189, 196, 292), Hubbard (R. 188–189, 196, 300, 325, 369–370) and Woodward (R. 188–189, 196) had all complimented the agents on the manner in which they were treated, commenting particularly upon the food. As for the sleeping quarters, it will be observed that each of them specified only one night as the occasion of real crowding; and although the petitioners did not say it was Sunday, there was evidence that on Sunday night these three petitioners were put in a cell together at their own request, after making complete oral confessions (R. 188, 195, 326–327). The trial court was entitled to weigh this evidence against the testimony of the petitioners and to find, as

it did, that they "exaggerated considerably the treatment they received" (R. 403).

It seems proper to take into account at this stage of the case, moreover, the testimony given by Sheriff Biggs and two of his deputies before the jury that the men in custody ate the same food as the deputies and that the meals were carried to the jail whenever necessary (R. 554, 566–569, 670). The cook who prepared the meals testified (R. 570):

> The deputy sheriffs ate the same meals as The prisoners. They had the same thing as the guards ate. We would run a regular course of meals through the week and chicken on Sunday, roast beef, stew, steak and onions or something like that. We had coffee about 19 cents a pound, I made it in an urn and drank it myself and these men drank the same sort of coffee I did. I never put anything in the coffee. I have carried food down to the city jail from the Y. M. C. A. myself.

The Sheriff also testified that the petitioners were furnished beds at the Y. M. C. A. (R. 547, 548, 554) and his chief deputy said that no one spent more than two nights in jail (R. 568).

On the whole, it seems apparent that the petitioners were not so badly treated as to affect their decision as to whether to confess. They were more crowded on one or two nights than seems proper and perhaps they were justified in complaining that one or two meals were scant.

But surely the judge was not required to find more, and on the issue of voluntariness, this much does not loom large; it was insufficient to make them confess falsely and cannot have caused any such debility as would weaken their wills.

4. The confessions were not induced by oppressive questioning

Putting aside, therefore, the claims of fraud, threats, and proffered leniency, we come to the heart of the case: Whether the interrogation of the petitioners by the F. B. I. agents was carried on in such a way and under such circumstances as to render the confessions unreliable or to violate the petitioners' constitutional rights. We have pointed out earlier that a confession may be voluntary although made by a prisoner in custody during examination by the police. The issue depends upon whether the questioning was so oppressive as to wear down the will of the prisoner and subjugate his judgment. (See p. 45, *supra.*) In the instant case it is clear that the length of the periods of questioning, the hours at which the questioning was carried on, and the manner in which the questioning was conducted were entirely reasonable. And the sequence of events shows with convincing clarity that the petitioners, who were not hardened criminals, confessed not from fear, oppression, or weariness but because they sought to unburden their consciences, immediately upon learning that outside investigation had discredited their initial false statements.

Simonds was the first petitioner to confess (R. 291). He had been questioned on Thursday afternoon from 2 o'clock until 4, and again that evening from 7 o'clock until 9 (R. 172, 173–174, 175, 274, 283, 289, 309, 315, 326, 336; R. 490, 787). The agents identified themselves, explained that they were connected with the Government, told Simonds what had been done, and explained what they wished to question him about. He was told that he did not have to answer questions unless he agreed, but he insisted that he was innocent of the charge and was therefore anxious to discuss his movements during the critical period. (R. 193.) Simonds gave an alibi; for example, he covered one period by saying that he was at home in bed (R. 193). The agents accepted his narrative and went on with their investigation (R. 291). Simonds testified that the agents treated him nicely enough the first day (R. 233, 235).

When the agents left Simonds, they checked his story by independent investigation and found that it was false (R. 184, 193, 292, 320, 328). For example, Simonds' wife told them that he was not at home with her as he claimed to have been (R. 184). Apparently, it was in the course of this investigation that Simonds was questioned for one hour on Friday, and for two short periods on Saturday (R. 311–312, 315, 387). On Sunday the agents confronted Simonds with the results of their investigation, and pointed out the discrepancies between his story and the infor-

mation that they had gleaned in their investigation, such as the conflict between his statement and that of his wife (R. 184, 193, 291–292, 321). This took about an hour (R. 285). Hubbard was present at the time (R. 285). Simonds suddenly said, "boys, I am just going to tell you I am guilty." Then, in answer to a request that he tell the whole story, Simonds described, without being asked leading questions, the meetings that he had attended, the arrangements made to secure the dynamite, his part in the crime, and the complicity of the others. (R. 274–275.) That same afternoon Roche reduced the statement to writing and it was signed by Simonds (R. 168).

In all this, there was neither misconduct by the agents nor oppression of the accused. The interrogation occurred at reasonable hours; Simonds was not interviewed after 9 P. M. The periods of questioning were not long, two periods of two hours each on Thursday with a three hour interval, an hour Friday, two half-hour periods Saturday, and an hour on Sunday afternoon before he admitted his guilt. See pp. 11–12, *supra*. The questioning was not carried on in a bullying, oppressive manner; as we pointed out above, Simonds was neither abused physically nor threatened with violence. See p. 66, *supra*. Neither was he wheedled by inducements to confess. See p. 64, *supra*. The agents did not curse him but treated him courteously at all times (R. 186, 276, 289, 290; R. 472, 787, 791, 820). Doubtless their

manner was firm, perhaps severe, for they pointed out the logic of the physical facts and the failure of Simonds' explanations to stand up upon investigation. But now that the conflicts in the testimony have been resolved in favor of the Government, it is clear that Simonds confessed in the exercise of his own uninfluenced judgment because he realized that the agents knew the truth, and not because their questioning compelled him to confess.

Hubbard was the second to make a statement; he confessed immediately after Simonds under the following circumstances (R. 274–275):

> When we [Roche and Plaxico] walked in there Sunday afternoon Earl Hubbard and Edward Simonds were in this room and Earl was laying down and Ed was sitting on a chair and Plaxico and I started talking to him and talked to him about 45 minutes to an hour and didn't talk to Hubbard at all, he just sat there listening in and finally Ed says, "boys, I am just going to tell you I am guilty," so we said, "Ed, we want you to tell us just what happened, start over and give us the truth about the entire transaction." No leading questions were asked and he started from the beginning, the first meeting he attended, the arrangements made in reference to the dynamiting, his participation in it and the implication of the others and finally at the conclusion Earl Hubbard said, "Ed, since you have confessed, I will tell my part," and

we said, "O. K., what did you have to do with it," and Hubbard told his implication and the two talked back and forth and Simonds said Felton Woodward knows more about this thing than anybody.

Hubbard was questioned for two hours on Thursday afternoon and for two hours more that night but not after eleven o'clock (R. 181, 283, 296–297, 309, 322–323, 335, 345, 351; R. 434, 490, 500, 788). On Friday he was questioned twice, during the day—once for fifteen or twenty minutes (R. 384, 391) and once for about 45 minutes (R. 434) and again between 7:30 and 9:30 in the evening (R. 358–359, 362–363, 367, 375, 376; R. 503, 506–507). On Saturday, the day on which the doctor found that Hubbard had a cold, McCabe interrogated him for two hours, Morgan asked questions at intervals during the afternoon and Plaxico questioned Hubbard twice, each time for about half an hour (see pp. 11–12, *supra*). But in weighing the effect of Saturday's questioning, it must be remembered that there was no physical violence, nor any bullying, threats, curses, or wheedling promises (see pp. 64–67, *supra*) and that Hubbard was not disturbed at unreasonable hours. Had he confessed Saturday, the case would be closer, although we believe a judgment as to whether his will was coerced would necessarily depend upon

an estimate of his personality that only the trial court could make. But Hubbard did not confess Saturday and was not questioned on Sunday before he confessed. He admitted his guilt when Simonds had finished speaking, and without urging, which is convincing that he was left free to speak or remain silent and that he wished to speak.

Nor was Woodward's confession induced by oppressive questioning. Roche, Mann, and probably Hevron questioned him for two hours on Thursday. Friday and Saturday no questions were put to him except for two brief periods of fifteen minutes each. On Sunday he was not questioned until late in the afternoon after Simonds and Hubbard had confessed. (See pp. 17–18, *supra*.) They told the agents that Woodward knew more about the dynamiting than anybody else and suggested bringing him in (R. 194–275). That was done, and Simonds and Hubbard told Woodward what they had said. Woodward commented (R. 275):

> * * * well there isn't a Hell of a lot we can do about it, you have already told them and I might as well tell what I did * * *

Thereupon, he confessed. "It was not a matter of us getting a written statement or admission from Felton Woodward at all. It was Ed Simonds pointing out to him the things he had told him to do and the things he knew he was

involved in" (R. 293). The next day Woodward's confession was written out. It was detailed and took most of the day to put in writing but plainly the critical point was passed for he was merely repeating and adding minutiae to his oral confession (see p. 18, *supra*). As in the instances of Simonds and Hubbard, the agents denied Woodward's testimony of promises of reward, threats, and curses (see pp. 64–68, *supra*). We think that there can be no fair claim that Woodward was coerced by the time, extent, or manner of questioning.

Rhodes, Queen, and Ballew likewise were not subjected to oppressive questioning. Rhodes' confession, by his own account, was written out, signed, and witnessed within two hours after he was first questioned at 10 o'clock in the morning. At that time he must have known that Simonds, Hubbard, and Woodward had confessed, for he had spent the previous night in jail with them. (See pp. 20–21, *supra*.) Queen "thought he had been misled" by the other defendants and "was anxious to give a statement" (R. 523). Ballew was questioned for one hour (R. 537) on the afternoon of the 29th and made a statement the following morning immediately after a brief conversation with Simonds (R. 803, 812–813). Although Ballew testified that he was deceived as to what he was signing, Ballew admitted "nobody cussed me out and I was not abused or threatened" (see p. 21, *supra*).

5. The confessions were not induced by the unlawful detention of petitioners without the advice of counsel

If the present case had rested exclusively on the issue of whether the conduct of the F. B. I. agents was unlawful and oppressive so as to amount to compulsion or duress, we should for the foregoing reasons have felt no hesitation in strongly opposing the petition for a writ of certiorari. But the unlawful detention by State officials, the possibly hostile atmosphere of the company town, and the absence of consultation with counsel raise questions which we thought this Court might wish to consider, although they do not call for reversal of the decision. Compare *Lisenba* v. *California*, 314 U. S. 219, 240. Petitioners rely particularly on "illegal detention, without advice of friends or counsel" (Br. 44–45) as ground for reversal. This contention is predicated solely upon the assumption that *Ward* v. *Texas*, *supra*, decides that a confession is inadmissible whenever it appears that the accused was illegally arrested or was interrogated before he had been arraigned and given the assistance of counsel (Br. 45). We have shown that petitioners misread the *Ward* case (see pp. 43–45, *supra*). The critical inquiry in every case is whether such circumstances constitute coercion and compulsion. In the instant case, such abuses as did occur fall in the category to be punished by the state and remedied by private action rather than by reversal of the con-

victions. For these added circumstances were not such as to subjugate the petitioners' wills and render their confessions involuntary.

The arrests were made without a warrant and probably were unlawful.[73] The detention of Simonds, Hubbard and Woodward for almost six days without a preliminary examination (four of which were before they confessed) was a violation of a Tennessee statute providing that no person shall be committed to prison before examination before a magistrate. Michie's Tennessee Code of 1938, § 11515.[74] Such conduct has been severely condemned by this Court and inevitably casts doubt upon any confession made while it endures. But if we are right in our belief that an unlawful arrest or confinement does not without more require exclusion of a confession,[75] then the illegality here was not of a character to require that result. Nor was it rendered so by the fact that dur-

[73] In Tennessee an officer may arrest without warrant a person who he has reasonable grounds to believe committed a felony which in fact has been committed. Michie's Tennessee Code of 1938 § 11536. But although apparently the sheriff believed that he was arresting the men for committing a felony (R. 550), we are not clear that under local law any felony had been committed. Destruction of the power lines and the conspiracy apparently were only misdemeanors. *Id.*, §§ 10863, 13065.

[74] As to Rhodes, Queen and Ballew, the legality of their detention may be open to doubt, for the statute allows the Sheriff some leeway and they were held only for a comparatively short time before being arraigned before the United States Commissioner. See *State* v. *National Surety Co.*, 162 Tenn. 547 (1931).

[75] See pp. 36, 43–45, 50–52, *supra*.

ing their detention the petitioners saw neither counsel nor friends nor relatives who were not under arrest. When an ignorant man is seized unlawfully and held without arraignment and without seeing other persons, the power of his captors may appear to increase each hour that they hold him *incommunicado*—the more so if his friends are poor and helpless or if they do not know his whereabouts. The very hopelessness of his situation may fill him with terror and render his will pliant to the will of his inferrogators. But the petitioners' attempt to portray their situation in that light should not succeed. Copperhill is a small town of about 1,000 people. A number of men were in custody; they were taken back and forth between the jail and the Y. M. C. A.; the prisoners knew that the agents were questioning people and carrying on their investigation. It is not unreasonable to conclude that the petitioners must have realized that the town knew them to be in custody. And the record, we think, makes plain what certainly the trial judge and jury with their opportunities for observation were warranted in concluding—that petitioners were neither ignorant men nor easily frightened. Hence, it is very significant that none of the petitioners even suggested that he sought and was refused leave to communicate with his friends and family. And, although two, Simonds and Hubbard, testified that the agents refused them counsel, the agents specifically testified that no such request

was made (R. 175, 290–291, 327, 372; R. 346–347, 352, cf. R. 325, 359, 368, 372, 385). The suggestion that this case involves a denial of the right to the assistance of counsel is therefore unwarranted.

One other circumstance of the detention remains. Petitioners contend that the fact that they were questioned at "the Company-owned headquarters of the petitioners' most hated and feared enemies—Sheriff Biggs and his deputies", exerted an "enormous psychological pressure" upon them to confess which was equivalent to the threat of mob violence described in *Chambers* v. *Florida*, 309 U. S. 227 (Br. 43–44), and which was more likely to induce fear and break down resistance than "taking the prisoner 'to lonely and isolated places for questioning'" as was done in *Ward* v. *Texas*, No. 974, last Term, decided June 1, 1942. Admittedly, the crimes grew out of a labor dispute; there were 20 or 25 armed deputies about as the result of a strike, men who doubtless were paid by the company; at times the petitioners were held and questioned on company property. How far these intangibles affected petitioners is not clear, but manifestly the petitioners overstate their case. The deputies did not participate in the questioning. The agents repeatedly assured the petitioners that they had no interest in the strike (R. 295, 349, 389–390). It is true that Hubbard said that the deputies laughed at him when they passed the open door (R. 209); and Simonds testified that they had laughed but that

he had not known whether they were laughing at him or not (R. 230). But no petitioner even intimated that fear of the deputies played a part in his decision to confess, and surely this testimony of Hubbard and Simonds does not require the conclusion that fear of the deputies influenced their confessions. On the contrary, there was evidence, not contradicted by any petitioner, that at least some of the strikers "were friendly with the deputy sheriffs" (R. 308), and that even Hubbard "indicated the deputy sheriffs had been nice to him" (R. 369–370).[76]

We should ignore reality if we argued that strikers would not feel discouraged when arrested in a company mining town and held for a serious crime, without examination before a magistrate by a Sheriff whose deputies were acting for the company. Yet in weighing those facts their effects should not be exaggerated. Had the questioning been oppressive, there might be some doubt. But the questioning was above reproach, and the sequence of events is convincing that the petitioners confessed from a realization that the truth would out, and from a desire to unburden their

[76] There was also testimony that after he confessed, Simonds stated that the F. B. I. men were "the finest bunch of men that he had ever come in contact with, he would like to be a Special Agent himself," and "thought he would go ahead and study and try to be a Special Agent" (R. 292. See also R. 233–234). Similarly, Hubbard thanked the agents "with tears in his eyes" and said "he had never been treated nicer in his life" (R. 300, 325).

consciences. Moreover, the petitioners were not held alone. *They and their fellows were in custody together,* and this close and constant association was necessarily a source of mutual strength and support. Moreover, the fact that a labor dispute was in the background is not wholly one-sided, for petitioners were members of a strong national union which was in a position to aid them through local counsel already on retainer if the circumstances seemed to require it. (See p. 14, *supra.*) We submit, therefore, that there is no substantial probability that the wills of the petitioners were bent or subjugated to the will of the officers that they confess.

CONCLUSION AS TO CONFESSIONS

The trial court ruled correctly that the confessions of Rhodes, Ballew, and Queen were admissible in evidence against them. Laying to one side the disputed facts, the only circumstances which can be cited against admissibility are that they were in custody and confessed in answer to examination by law enforcement officers. A confession is not involuntary for those reasons alone. *Wan* v. *United States,* 266 U. S. 1, 14. It would make no difference if the detention was unlawful.

We submit, also, that examining the facts *de novo,* the confessions of Simonds, Hubbard, and Woodward are shown to be voluntary. We believe that no one can read the entire record without

reaching the firm conviction that petitioners' confessions were made voluntarily; that their claims of duress, coercion and intimidation are grossly exaggerated; and that the F. B. I. agents to whom the confessions were given were not guilty of any improper or oppressive conduct. And although the truth of a confession furnishes no ground for receiving it into evidence, the unusual nature of the admissions made in the confessions here involved, the detailed description of all of the meetings, preparations, and plans, of the manner in which the dynamite and other equipment was obtained, moved, and concealed, and of the technique used in blasting the poles and steel towers, are all utterly inconsistent with petitioners' claim that the agents fabricated the confessions.

But even assuming that upon a *de novo* examination of the facts there is room for doubt whether the confessions of Simonds, Hubbard and Woodward were voluntary, it is clear that there was no reversible error in admitting them. The elements tending to show coercion were intangibles at best, which would be evaluated only by those who had watched these three petitioners and the agents on the witness stand and could judge, in the light of local experience, the petitioners' reaction to the events. There is nothing in the record which requires the conclusion that any one of them in fact "was no longer able freely to admit or to deny or to refuse to answer." [77] The

[77] *Ward* v. *Texas*, No. 974, last Term, decided June 1, 1942.

trial court, and the jury under a careful charge, concluded that the confessions were voluntary. The finding of ultimate fact was not unreasonable and, therefore, their decision should be sustained.

II

NO PETITIONER WAS PREJUDICED BY THE READING INTO THE RECORD OF ANOTHER'S CONFESSION IMPLICATING HIM

Although the confessions were introduced with the names of the co-conspirators deleted, petitioners contend that, since the names were read into the record during cross-examination of those who confessed, "the erroneous admission of any one of the confessions constituted prejudicial error to all other petitioners implicated by such confession," because prejudicial inferences were thereby conveyed to the jury "which would not have been present otherwise" (Br. 49–51). This contention, we submit, is not persuasive. In his charge the judge made it clear that a confession was evidence against only the defendant who made it and any other defendant who was present and named in the confession but did not deny the accusation (R. 831–850). Since the confessions were thus properly limited in their effect as evidence (*Hagen* v. *United States*, 268 Fed. 344, 345–346 (C. C. A. 9), certiorari denied, 255 U. S. 569), it is clear that any error in admitting a confession would be grounds for reversal only of the con-

viction of the petitioner against whom it was admitted.

The argument to the contrary (Br. 49–51) is based upon the assumption that any involuntary confession permeated the whole case and was made the basis of all the convictions in spite of the charge. This argument could be equally well made regardless of whether the confessions were voluntary or involuntary, for in either event they could not be used as evidence against the other defendants. The argument might carry weight before trial on a motion that the defendants who did not confess should have separate trials. But the objection comes too late where no such motion was made and after the trial court has taken every step to protect their interests.

The evidence exclusive of the confessions, moreover, makes it clear that none of the petitioners was prejudiced by the use made of the others' confessions.

Anderson and Ellis, who did not confess, have abandoned (Br. 39) their attack upon the sufficiency of the evidence, and the proof of their guilt, apart from the confessions, is clear and convincing. Anderson was implicated by the confessions of Woodward (R. 706–707, 710, 713–719, 721, 730), Hubbard (R. 672, 674, 675) and Simonds (R. 664, 665); but his identity as the ringleader who wanted the towers and poles blown up, and at whose office the conspirators met to plan the dynamitings (R. 133–135), had already been established by the

testimony of Freed Long, who had been driven to the first meeting in Anderson's car (R. 132).

Ellis was mentioned in Woodward's statement (R. 710, 711, 713, 716). But abundant other evidence also pointed to his guilt. He drove Long in Anderson's car to the meeting of the conspirators on April 13th (R. 132, 137). He was very close to Anderson in union matters, for he worked around Anderson's office and ran errands for him (R. 587, 611); thus, he was a person likely to know of any plans to aid the strike by recourse to violence. And, what is most important, Anderson's car made suspicious movements on March 31st, the night of the first dynamiting, over unpaved side roads. Ellis was driving; with him were his wife and child, and there had been an unidentified passenger (R. 152, 153, 158). Aroused by it suspicious movements, sheriff's deputies stopped and searched the car; in it were a brace and two bits, the larger of which measured about an inch and a quarter in diameter (R. 153, 154, 156, 157, 159, 160). About fifteen minutes later the first explosion occurred (R. 157). The poles supporting the power line had been bored with a brace and bit to make holes for the dynamite. Ellis gave no satisfactory explanation for his movements, explaining that he was driving around "to relieve the baby's colic"; that while riding around they had left the paved road and had driven off on a side road because his wife "had never been out on that road"; and that the passenger was a stranger, a hitch-hiker

whom he had picked up on the road (R. 606, 607). The evidence referred to linked Anderson and Ellis so strongly to the conspiracy that the cumulative effect of the mentioning of their names in any of the confessions was of little consequence.

In the cases of the petitioners who confessed, each statement, when considered with the testimony of Freed Long and the other corroborating independent evidence of the conspiracy (see pp. 4–7, *supra*), overwhelmingly established the guilt of the one who made it, and none of these petitioners can reasonably be said to have been prejudiced even though another's confession implicating him might have been erroneously admitted.

III

THERE WAS SUFFICIENT EVIDENCE CORROBORATING THEIR CONFESSIONS TO SUPPORT THE CONVICTIONS OF RHODES, QUEEN, AND BALLEW

Petitioners Rhodes, Queen, and Ballew, whom we have shown to have no substantial basis for their claim that their confessions were involuntary, contend that "lack of corroboration of [their] confessions * * * rendered their conviction erroneous as a matter of law" (Br. 51–56). This contention, we submit, is wholly without merit.

It is well settled, as the court below pointed out (R. 876), that the conviction of an accused in a criminal case cannot be supported by an uncorroborated confession. See also, *Evans* v. *United States*,

122 F. (2d) 461, 465 (C. C. A. 10), certiorari denied, 314 U. S. 698, and authorities there cited. "The corroboration must touch the corpus delicti" (*Daeche* v. *United States*, 250 Fed. 566, 571 (C. C. A. 2)), which in a conspiracy, consists of "the unlawful combination, confederacy, and agreement between two or more persons." *Ryan* v. *United States*, 99 F. (2d) 864, 869–870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *United States* v. *Manton*, 107 F. (2d) 834, 838 (C. C. A. 2), certiorari denied, 309 U. S. 664. It is not required, however, "that the independent evidence of *corpus delicti* shall be so full and complete as to establish unaided the commission of a crime. It is sufficient if the extrinsic circumstances, taken in connection with the defendant's admission, satisfy the jury of the defendant's guilt beyond a reasonable doubt." *Jordan* v. *United States*, 60 F. (2d) 4, 5 (C. C. A. 4), certiorari denied, 287 U. S. 633. See also, *Evans* v. *United States*, *supra*, at 465; *Ryan* v. *United States*, 99 F. (2d) 864, 870 (C. C. A. 8), certiorari denied, 306 U. S. 635; *Forte* v. *United States*, 94 F. (2d) 236, 240 (App. D. C.); *Wiggins* v. *United States*, 64 F. (2d) 950, 952 (C. C. A. 9), certiorari denied, 290 U. S. 657.

In the instant case it is clear that the confessions were adequately corroborated by independent evidence. Freed Long testified as to the existence of a conspiracy to blow up the power lines

leading into the Copper Basin. He described in detail the meetings of some of the conspirators and, in advance, told the Sheriff when the last explosion would take place. See pp. 4–6 *supra*. Moreover, even without his testimony, it would have been obvious that there had been a conspiracy. Service had to be interrupted on both lines to deprive the company of power (R. 129), and the two different lines which were miles apart and in hilly country (R. 128–131) were dynamited almost simultaneously. More than one man was necessary to carry the tools, fuse, and explosive, and planning was essential to assemble them.

These three petitioners make no claim that their convictions are not supported by the confessions and the corroborating evidence. Relying upon *Forte* v. *United States*, 94 F. (2d) 236 (App. D. C.), they argue that in a conspiracy, like any other offense requiring *scienter*, the identity of the criminal is an element of the *corpus delicti* "which must be proved by independent evidence" (Br. 54), and that since there is no evidence other than their confessions to connect them with the crime (R. 875), their convictions were erroneous. The decision in the *Forte* case, however, compels no such conclusion.[78] That case involved a prose-

[78] In *George* v. *United States*, 125 F. (2d) 559, 563 (App. D. C.), Associate Justice Stephens, who wrote the opinion in the *Forte* case, said: "We did not hold [in the *Forte* case] that the connection of the accused with the crime must be shown by evidence outside the confession."

cution for interstate transportation of a stolen car, knowing it to be stolen. The court held that guilty knowledge was an element of the *corpus delicti* as to which corroboration of the confession by independent evidence was required. And since the Government had expressly waived reliance upon the inference of guilty knowledge arising from possession of the stolen car, the court held there was insufficient corroboration to justify use of the confession. In the instant case, however, there was substantial evidence to support the inference that those who dynamited the lines must have known that what they did was part of a common design. "Proof of a conspiracy may be by circumstantial evidence, often times by overt acts alone" (*Marino* v. *United States,* 91 F. (2d) 691, 698 C. C. A. 9), certiorari denied *sub nom. Gullo* v. *United States,* 302 U. S. 764), and guilty knowledge may be inferred. *Id.,* at 699. We think it is clear, therefore, that petitioners were properly convicted."[19] If the *Forte* case stands for

[19] See also *Pinkussohn* v. *United States*, 88 F. (2d) 70 (C. C. A. 7), certiorari denied, 302 U. S. 702; *Vinkemulder* v. *United States*, 64 F. (2d) 535 (C. C. A. 5), certiorari denied, 290 U. S. 666; *Aplin* v. *United States*, 41 F. (2d) 495 (C. C. A. 9); *Rich* v. *United States*, 271 Fed. 566, 569 (C. C. A. 8); *United States* v. *Marcus*, 53 Fed. 784, 786 (C. C. S. D. N. Y.), error dismissed, *Marcus* v. *United States*, 159 U. S. 259. The rule in the state courts likewise permits conviction when the confession is the only evidence linking the crime to the defendant. *Vernon* v. *State*, 239 Ala. 593, 598–599, reversed on other grounds, 313 U. S. 547; *Williams* v. *State*, 8

a different rule, then, we submit, that case is contrary to the weight of authority represented by the decisions cited above [80] and to the rationale of the rule requiring corroboration which is merely to protect "the administration of the criminal law against errors in convictions *based upon untrue confessions alone.*" [Emphasis added.] *Warszower* v. *United States*, 312 U. S. 342, 347.[81]

Ala. App. 394; *Ivy* v. *State*, 109 Ark. 446; *Standridge* v. *State*, 169 Ark. 294; *People* v. *Tarbox*, 115 Cal. 57, 62; *People* v. *Stephens*, 30 Cal. App. (2d) 67; *Cochran* v. *State*, 113 Ga. 726, 736; *Messel* v. *State*, 176 Ind. 214; *State* v. *Cook*, 188 Iowa 655, 662; *Frierson* v. *Commonwealth*, 175 Ky. 684; *Weller* v. *State*, 150 Md. 278; *Commonwealth* v. *Morrissey*, 175 Mass. 264; *People* v. *Dowd*, 252 Mich. 404; *Roberts* v. *State*, 153 Miss. 622; *State* v. *Rickart*, 81 S. W. (2d) 309 (Mo.); *Chezem* v. *State*, 56 Neb. 496; *People* v. *Taleisnik*, 225 N. Y. 489, 494; *State* v. *Knapp*, 70 Ohio St. 380; *Edwards* v. *State*, 46 Okla. Crim. 77, *semble*; *Commonwealth* v. *Kauffman*, 94 Pa. Super. 419; *Burk* v. *State*, 50 Tex. Crim. 185; *Cleek* v. *Commonwealth*, 165 Va. 697. See also, Wharton, *Criminal Evidence* (10th ed.), §§ 633, 634. But cf. Underhill, *Criminal Evidence* (3d ed.), § 240.

[80] See also *Smith* v. *United States*, 9 F. (2d) 386, 387 (C. C. A. 9), certiorari denied *sub nom. Oreb* v. *United States*, 271 U. S. 674, where the court held that admissions made by three of five alleged conspirators were admissible against those who made them "in any event" even though "In the absence of a complete statement of the evidence previously received, [the court could not] say whether or not there was prima facie evidence of the conspiracy."

[81] As petitioners assert (Br. 55), the court in the *Forte* case (94 F. (2d) at 239) "stated that a real danger of [the use of] false confessions, coerced or psychopathic, is created by the evidence in the decisions of the Courts and the dependable reports of criminological investigations of lawlessness on the part of law enforcement officials." But it should be

CONCLUSION.

It is respectfully submitted for these reasons that each of the judgments of conviction below should be affirmed.

CHARLES FAHY,
Solicitor General.

WENDELL BERGE,
Assistant Attorney General.

OSCAR A. PROVOST,
ARCHIBALD COX,
ANDREW F. OEHMANN,
Attorneys.

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noted that the court there also stated that "Happily * * * according to the Report of the National Commission referred to, there is little evidence of the use of third degree methods by Federal officials anywhere" (94 F. (2d) at 240). And we have fully shown, *supra*, that the confessions used herein were not obtained by third degree methods.

APPENDIX

Collected below are illustrative cases from each of the states showing the division of responsibility between trial and appellate courts in passing upon the admissibility of extra-judicial confessions.

Alabama: *Morton* v. *State,* 206 Ala. 300 (ruling of trial court will be affirmed except in cases of "manifest error".)

Arizona: *Kermeen* v. *State,* 17 Ariz. 263, 266 (ruling of trial court will be affirmed unless its "sound legal discretion * * * has clearly been abused"); *Indian Fred* v. *State,* 36 Ariz. 48, 58–59 (same).

Arkansas: *Runnels* v. *State,* 28 Ark. 121, 125 (the trial judge "admits or rejects them as appears right in his discretion, and his judgment is not a subject of reversal unless arbitrarily abused". See also *Williams* v. *State,* 63 Ark. 527, 530.

California: *People* v. *Castello,* 194 Cal. 595, 600 ("The trial court is clothed with considerable discretion"); *People* v. *Connelly,* 195 Cal. 584, 598 (no reversal unless trial court "abused its discretion"); *People* v. *Perry,* 195 Cal. 623, 636 (the trial court has "wide discretion").

Colorado: *Mitchell* v. *People,* 76 Colo. 346, 348 (no reversal unless there was a "clear abuse of discretion"); *Moya* v. *People,* 88 Colo. 139, 142 (no reversal unless there was a "clear abuse of discretion").

Connecticut: *State* v. *Cross,* 72 Conn. 722, 727 (no reversal unless "discretion was abused"); *State* v. *Di Battista,* 110 Conn. 549, 563 (no reversal unless

there was "an unreasonable exercise of the court's discretion").

Delaware: no cases.

Florida: *McCall* v. *State,* 120 Fla. 707, 718 (no reversal except "in case of abuse of his discretion").

Georgia: *Bryant* v. *State,* 191 Ga. 686, 711 (the trial court has "discretion").

Idaho: *State* v. *Dowell,* 47 Idaho, 457, 464 (the question of admissibility is addressed "primarily to the discretion of the trial court").

Illinois: *People* v. *Guido,* 321 Ill. 397, 411 (no reversal unless the trial court's ruling was an "abuse of discretion" and "manifestly against the weight of the evidence").

Indiana: *Tuppin* v. *State,* 206 Ind. 345, 350 (no reversal except in cases of "abuse of discretion"). Cf. *Hauk* v. *State,* 148 Ind. 238, 252–253 (the appellate court is "not authorized to weigh the evidence * * * or attempt to reconcile any conflict therein").

Iowa: *State* v. *Storms,* 113 Iowa, 385, 392 (the question is "peculiarly in the sound discretion of the trial judge" because "the trial court saw and heard the witnesses, and had better knowledge of the facts than we can possibly have").

Kansas: no cases.

Kentucky: *Howard* v. *Commonwealth,* 28 Ky. Law Rep. 737, 738 (the question is within the "sound discretion" of the trial court).

Louisiana: *State* v. *Bartley,* 34 La. Ann. 147, 150 ("the ruling of a Judge of the first instance on a question of this character should not be disturbed, unless clearly erroneous. The presence of the witnesses before him, their manner of testifying,

character, etc., offered an opportunity of reaching a correct conclusion in the point at issue, superior to any we possess").

Maine: *State* v. *Grover,* 96 Me. 363, 366 ("the question must be determined by the presiding justice as a question of fact. In 1 Greenl. Ev. 219, it is stated that the matter rests wholly in the discretion of the judge. Upon exceptions to his opinion on this question the law court should not reverse his decision merely because it would itself have come to a different conclusion, but only when the circumstances are such that it can say as matter of law, that the confession was not voluntary in the legal sense. It will regard the findings of the presiding justice upon this question of fact, as it does the findings of a jury upon questions of negligence, as entitled to stand unless the contrary inference is the only reasonable one").

Maryland: no cases.

Massachusetts: no cases.

Michigan: no cases.

Minnesota: *State* v. *Staley,* 14 Minn. 105, 112 (the question rests "to some extent in the discretion" of the trial court); *State* v. *Holden,* 42 Minn. 350, 353 (no reversal "unless * * * manifestly against the weight of the evidence); *State* v. *Nelson,* 199 Minn. 86, 89 (no reversal "unless manifestly contrary to the evidence").

Mississippi: no cases.

Missouri: *State* v. *Hopkirk,* 84 Mo. 278, 284 (no reversal except for "error manifest").

Montana: *State* v. *Berberick,* 38 Mont. 423, 442 (no reversal unless "clearly in conflict with the weight of the evidence"); *State* v. *Ratkovich,* 111 Mont. 19, 26 (question rests in the "sound discretion of the court").

Nebraska: no cases.

Nevada: no cases.

New Hampshire: no cases.

New Jersey: *State* v. *Dolan*, 86 N. J. L. 192, 195 (the ruling of the trial judge will not be reversed "if there be any legal evidence to support" it); see also *Roesel* v. *State*, 62 N. J. L. 216, 236–238, and *State* v. *Zeller*, 77 N. J. L. 619, 622.

New Mexico: no cases.

New York: no cases.

North Carolina: *State* v. *Burgwyn*, 87 N. C. 572 (where the subsidiary facts are established the question is one of law); but cf. *State* v. *Smith*, 213 N. C. 299 (the trial court should find only the ultimate fact).

North Dakota: *State* v. *Kerns*, 50 N. D. 927, 936 (no reversal "unless manifestly against the weight of the evidence").

Ohio: no cases.

Oklahoma: *Berry* v. *State*, 4 Okla. Cr. 202, 207–208 (the trial court has "large discretion"); *Doublehead* v. *State*, 27 Okla. Cr. 375, 387 (the trial court has "large discretion"); *Hix* v. *State*, 29 Okla. Cr. 20, 26 (the trial court has "large discretion"); see also *Tarkington* v. *State*, 41 Okla. Cr. 423.

Oregon: *State* v. *Humphrey*, 63 Ore. 540, 553 (the trial court is allowed "much latitude"); *State* v. *Morris*, 83 Ore. 429, 440 (no reversal "unless there is clear and manifest error"); *State* v. *Jordan*, 146 Ore. 504, 511 (no reversal of the trial court's exercise of its "discretion" unless its "discretion" was abused).

Pennsylvania: *Fife* v. *Commonwealth*, 29 Pa. St. 429, 437 (no reversal except for "clear and manifest error").

Rhode Island: no cases.

South Carolina: no clear cases. But see *State* v. *Carson*, 36 S. C. 524, and *State* v. *Derrick*, 44 S. C. 344, indicating that the question on review is narrow.

South Dakota: *State* v. *Allison*, 24 S. D. 622, 626 (no reversal unless "clearly against the weight of testimony").

Tennessee: no cases.

Texas: no clear cases. But see *Wheatley* v. *State*, 117 Tex. Cr. 599, 601, indicating that the question is "within the discretion of the [trial] court".

Utah: no cases.

Vermont: *State* v. *Day*, 55 Vt. 510 (on undisputed facts the question is one of law).

Virginia: *Omohundro* v. *Commonwealth*, 138 Va. 854, 864 (the finding of the trial judge will be given the "same weight and effect as is given to a finding of fact by a jury"); *Upshur* v. *Commonwealth*, 170 Va. 649, 655 (the trial court has "wide discretion").

Washington: no cases.

West Virginia: *State* v. *Mayle*, 108 W. Va. 681, 685 (the trial court has "wide discretion").

Wisconsin: *Tarasinski* v. *State*, 146 Wisc. 508, 513 (the ruling will not be reversed "unless manifestly wrong"); *Lang* v. *State*, 178 Wisc. 114, 124 (the ruling will not be reversed unless "clearly against the evidence").

Wyoming: no cases.

The decisions of the inferior federal courts are collected p. 61, n. 67, *supra*.

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